(1) 89-459

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,
Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, a union grievance which seeks damages for a claimed breach of a collective bargaining agreement's successor clause—purportedly requiring a merged airline to recognize the union as the representative of a minority group of employees—after a merger—raises issues of employee representation within the exclusive jurisdiction of the National Mediation Board.

2. Whether the National Mediation Board's decision terminating the union representation certification of the acquired carrier's union, as of the date of the merger, renders moot the union's request to arbitrate a grievance involving representation issues under a successor clause.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit appear in the caption of the case in this Court, except Western Air Lines, Inc. It should be noted, however, that Western Air Lines, Inc., which was the original appellee in these proceedings, ceased to exist when it was merged into Delta Air Lines, Inc. on April 1, 1987.*

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* Pursuant to Rule 28 of the Rules of this Court, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; Gatwick Handling, Ltd.; and SkyWest, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delta Air Lines, Inc. respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), entered in the proceedings below on July 18, 1989.

OPINIONS AND ORDERS BELOW

The opinion of the D.C. Circuit, entered on July 18, 1989, is reported at 879 F.2d 906, and is reproduced in Appendix A. Copies of that court's preliminary orders of June 6, 1988, and March 31, 1987, are unreported and are reproduced in Appendices B and C. The final opinion and judgment of the D.C. Circuit reversed the judgment of the United States District Court for the District of Columbia. A copy of the order and opinion of the district court, which is reported at 662 F. Supp. 1, is reproduced in Appendix D.

JURISDICTION

The opinion and judgment of the D.C. Circuit were rendered in this case on July 18, 1989. This Petition is filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Railway Labor Act, 45 U.S.C. §§ 151-88, specifically §§ 152, Fourth and Ninth, and 181. Those provisions are reproduced in Appendix N.

STATEMENT OF THE CASE

I. The Relevant Facts

This case arises from a labor dispute involving the 1987 merger of Western Air Lines, Inc. ("Western") into Delta Air Lines, Inc. ("Delta"). Respondent Association of Flight Attendants ("AFA"), which represented Western's flight

attendants prior to the merger, filed suit in the United States District Court for the District of Columbia seeking an order compelling Western to arbitrate AFA's grievance claim that Western was required to bind Delta to AFA's collective bargaining agreement with Western under the successor clause of that union agreement. AFA's grievance alleged that Western violated the successor clause by failing to secure Delta's agreement to be bound by AFA's union agreement and to recognize the AFA after the merger was completed. Western refused to arbitrate AFA's grievance on the grounds that it raised employee representation issues within the exclusive jurisdiction of the National Mediation Board ("NMB").

Prior to the merger, Delta employed more than three times as many flight attendants as Western. Those Delta flight attendants have opted to have no collective bargaining representative. Thus, after the merger, a large majority (greater than 75%) of the flight attendant craft or class was made up of original Delta employees who have never chosen to be represented by a union.

Pursuant to a September 1986 merger agreement, Delta acquired Western on December 18, 1986, at which time Western become a wholly owned subsidiary of Delta, operating as a separate carrier. On April 1, 1987, Western was legally and operationally merged into Delta and ceased to exist as a separate entity. The merger agreement required Western to honor its collective bargaining agreements as long as it operated as a separate carrier.

As Judge Gesell found in this case, "No layoffs [of Western employees] are contemplated, either before or after the merger." App D, 29a, 662 F. Supp., at 2. Delta offered postmerger jobs to all flight attendants without requiring any of them to move. Since the wages and benefits paid by Delta were significantly higher than Western's, Delta gave substantial pay increases to most Western employees after the merger, including flight attendants. *Id.*, at 29a, 662 F. Supp., at 2.

In the merger agreement, Delta also voluntarily agreed to provide Western employees with significant labor protective provisions ("LPP's") at least as favorable as the standard LPP's imposed by the Civil Aeronautics Board ("CAB") in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1971), which the Department of Transportation ceased imposing after airline deregulation. App. D, 29a, 662 F. Supp., at 2 n.2. The LPP's include a fair and equitable integration of seniority lists. In accordance with the LPP's, the former Western employees represented by the AFA have been integrated with the original Delta employees.

II. The Proceedings Below And In Related Litigation Before This Court

AFA filed this action on January 8, 1987, to compel arbitration of a labor grievance. AFA contended that under the labor agreement's successor clause Western must require Delta to be bound to AFA's labor contract and recognize AFA as the representative of Western's flight attendants after the Delta-Western merger. AFA characterized this as a "minor dispute" under the Railway Labor Act, involving contract interpretation which should be arbitrated before Western's System Board of Adjustment. Western refused to arbitrate on grounds that the grievance actually raised a representation dispute that lay within the exclusive jurisdiction of the NMB.

On February 20, 1987, Judge Gesell granted summary judgment for Western, finding that this dispute was within the NMB's exclusive jurisdiction:

> Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA. . . .

> For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA.

App. D, 31a-32a, 662 F. Supp., at 3 (footnote and citations omitted). AFA then asked the D.C. Circuit for an injunction to compel arbitration pending appeal, which that court denied on March 31, 1987. App. C, 26a.

On June 29, 1987, the D.C. Circuit granted AFA's unopposed motion for stay pending this Court's disposition of Delta's petition for certiorari in the related litigation initiated by two other Western unions in the Ninth Circuit. AFA's motion acknowledged that the Ninth Circuit litigation "grows out of the same transaction as in the instant case," and that it "raises the same legal issue as is posed here, namely, the arbitrability and enforceability of a successorship provision in a collective bargaining agreement under the Railway Labor Act. . . ." AFA Motion to Stay Briefing Schedule, at 1-2 ("Motion for Stay").

In the Ninth Circuit litigation, two other Western unions filed actions in the Central District of California similar to AFA's. They sought to compel arbitration of grievances over the successor provisions in their labor agreements, encompassing damages and other relief, the same order sought by AFA here. Both actions were dismissed by the California district court on the same jurisdictional grounds cited by Judge Gesell in the instant case. *See International Brotherhood of Teamsters v. Western Air Lines, Inc.*, No. 86-7921 (C.D. Cal. Feb. 13, 1987) (App. E, 34a-36a); *Air Transport Employees v. Western Air Lines, Inc.*, No. 86-8032 (C.D. Cal. Feb. 13, 1987) (App. F, 37a-38a).

On March 31, 1987, the Ninth Circuit reversed both decisions and issued an injunction compelling arbitration of the unions' grievances and enjoining the merger of Delta and Western pending arbitration. *IBTCHWA, Local Union No. 2702 v. Western Air Lines, Inc.*, 813 F.2d 1359 (9th

Cir.) (*"IBTCHWA I"*), *vacated and remanded*, 108 S. Ct. 53 (1987). Western and Delta immediately sought an emergency stay of the Ninth Circuit's order and injunction. On April 1, 1987, Justice O'Connor, Circuit Justice, granted the stay (App. G, 39a). On April 2, 1987, Justice O'Connor issued a written opinion declaring that:

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.

Western Air Lines v. International Brotherhood of Teamsters, 480 U.S. 1301, 1305 (1987) (*"Western v. Teamsters"*) (App. H, 44a-45a). Justice O'Connor reviewed the same "overwhelming and well-developed case law" earlier cited by Judge Gesell in the instant case, *id.*, at 45a, 480 U.S., at 1306, and commented favorably upon Judge Gesell's analysis and the D.C. Circuit's denial of AFA's request for an injunction pending appeal. *Id.*, at 46a, 480 U.S., at 1306-07. On April 6, 1987, this Court, without dissent, denied the unions' emergency applications to vacate Justice O'Connor's stay. 481 U.S. 1002 (1987). Delta then filed a timely certiorari petition, which was pending before this Court at the time of AFA's Motion for Stay in the instant case.

While that certiorari petition was pending and the instant case was stayed before the D.C. Circuit, on July 9, 1987, the National Mediation Board ("NMB") issued its decision revoking the employee representation certifications of all former Western unions, including AFA's, effective retroactively to April 1, 1987. *Delta Air Lines/ Western Air Lines*, 14 N.M.B. 291 (*"Delta/Western"*) (1987) (App. I, 50a-62a). On October 5, 1987, after the NMB's termination of the former Western unions' certifications,

this Court, again without dissent, granted Delta's petition for certiorari, vacated the Ninth Circuit's judgment and remanded those cases to the Ninth Circuit to consider the question of mootness. *Delta Air Lines, Inc. v. International Brotherhood of Teamsters*, 108 S. Ct. 53 (1987) (App. J, 63a). On August 18, 1988, the Ninth Circuit dismissed the actions as moot (including the damages claims) on the basis that "none of the relief sought in the original complaint is now available." *IBTCHWA, Local No. 2702 v. Western Air Lines, Inc.*, 854 F.2d 1178 (9th Cir. Aug. 18, 1988) (*"IBTCHWA II"*) (App. K, 64a).

Meanwhile, following this Court's remand to the Ninth Circuit, Delta moved the D.C. Circuit to dismiss the instant case on grounds of mootness, arguing that the decision of the NMB revoking AFA's certification supplanted any possible award of an arbitrator. Denying the motion, on June 6, 1988, the D.C. Circuit held the following:

> Although *Appellant's claim based on any right of continued representation is moot*, it is not clear whether an arbitrator could award damages for breach of the collective bargaining agreement. It is
>
> FURTHER ORDERED that the parties limit their briefs to the issue of whether an arbitrator could award damages to Appellant if the arbitrator finds that Appellee breached the collective bargaining agreement.

App. B, 25a (emphasis added).

On July 18, 1989, the D.C. Circuit issued a decision reversing the district court determination in favor of Delta and remanding the case to the district court to order arbitration of AFA's damages claim. The D.C. Circuit concurred with the Ninth Circuit's finding of mootness as to all of AFA's claims except those for damages. App. A, 6a-7a, 879 F.2d, at 909. The D.C. Circuit found that the NMB's action had not mooted AFA's claims for damages, *id.*, at 9a, 879 F.2d, at 910, and that the NMB's exclusive jurisdiction over representation disputes did not deprive

the district court of authority to order arbitration of the damages claims. *Id.*, at 23a-24a, 879 F.2d, at 917.

Delta moved for a stay of the D.C. Circuit's mandate pending certiorari so that the important legal issues could be resolved by this Court before the arbitration which Delta contends should not proceed. AFA concurred in the motion, and the D.C. Circuit granted it. (App. L, 66a)

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS FOR GRANTING THE WRIT

The D.C. Circuit concluded that the court has jurisdiction to order arbitration of AFA's damages claim. The D.C. Circuit's decision conflicts with a long line of other circuit court decisions, all of which have concluded that courts (and arbitrators) do not have any jurisdiction in cases that involve representation issues and that such matters must be left to the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act. These cases have so held in a variety of situations, including some which are factually as well as legally indistinguishable from the instant case. The D.C. Circuit reaches its conflicting result because it incorrectly tries to separate the damages remedy that AFA now seeks from AFA's underlying claim of a contract violation, which necessarily involves a representation dispute. In order to award damages or any relief, an arbitrator would first have to make a finding on the representation issues involved in the contract violation alleged by AFA, *i.e.*, that the successor clause of the AFA/Western contract entitled AFA to be recognized by Delta as the representative of former Western flight attendants. Such a finding by an arbitrator, however, would assume that the arbitrator had the underlying jurisdiction to determine the rights and obligations of the parties with respect to representation. Any such finding would invade the exclusive jurisdiction of the NMB and would be directly at odds with the NMB's decision that AFA's right to represent Western's flight attendants was extinguished on April 1, 1987.

Further, the D.C. Circuit decision conflicts with the Ninth Circuit's decision in the parallel litigation with respect to this same Delta-Western merger. The D.C. Circuit found that the NMB's decision terminating the representation certifications of all of Western's former unions did not render moot the damages claims of the AFA under its successor clause, but the Ninth Circuit ruled that those same damages claims by two other unions were moot. The D.C. Circuit acknowledged this conflict. Thus, Delta is subject to two totally inconsistent rulings of law on the same issue in the same merger. It was this Court that correctly raised the mootness issue, vacating and remanding the parallel case to the Ninth Circuit to consider that question.

The resolution of these conflicts are of vital national importance to our critical air and rail transportation industries. Only this Court can resolve these conflicts and put right again this previously settled area of labor law.

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE JURISDICTION OF THE FEDERAL COURTS IN REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

A. The NMB Has Exclusive Jurisdiction Of All Employee Representation Disputes Under The Railway Labor Act And Every Other Court Of Appeals Decision On The Issue Has Concluded That The Courts Do Not Have Any Jurisdiction In Cases That Raise Questions Of Representation, Regardless Of The Context In Which They Arise

The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-63, regulates labor relations of the nation's railroads and, through Title II, 45 U.S.C. §§ 181-88, air carriers. Justice O'Connor, in related litigation arising out of this same Delta-Western merger, has summarized the types of disputes cognizable under the RLA as follows:

> The [Railway Labor] Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the ap-

> plication or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. § 184. . . .
>
> "Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by §6 of the Act, 45 U.S.C. §§ 156, 181. "Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under § 2, Ninth of the Act, the National Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §§ 152, 181.

App. H, 41a-42a, 480 U.S., at 1302-03.

The NMB has exclusive jurisdiction of all disputes regarding employee representation. 45 U.S.C. § 152, Ninth. This Court has expressly held that the sweeping jurisdiction of the NMB over representation disputes is exclusive. *See General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943); *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

The RLA contemplates that employees will be represented on a carrier-wide basis through crafts or classes of employees and that the majority of the employees in each craft or class may select a bargaining representative. 45 U.S.C. § 152, Fourth. The NMB has held on numerous occasions that it has no authority to split a craft or class or fragment a carrier's labor force:

> The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the *whole* of a craft or class employed by a carrier.

Pennsylvania Railroad Co., 1 N.M.B. 23, 24 (1937) (emphasis in original).

Applying this principle, the NMB has specifically held that upon the merger of two airlines, the representation certifications of unions of the acquired airline whose employees will constitute only a minority of the combined employee groups after the merger, are extinguished by operation of law at the time of the merger. *See Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986); *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980). More recently, in *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 ("*TWA*") (Apr. 10, 1987), the NMB reaffirmed these principles, but indicated that representation certifications are not formally extinguished as a result of a merger until the NMB so rules. Pursuant to these principles, the NMB revoked the representation certifications of all former Western unions, including AFA, retroactive to the April 1, 1987 merger date. *Delta/Western*, 14 N.M.B. 291 (1987) (*See* App. I, 50a).

The NMB also said that in view of the increasing number of mergers under deregulation it would develop new procedures for handling representation matters resulting from mergers in the near future. *TWA*, 14 N.M.B., at 241. Subsequently, on July 31, 1987, the NMB issued its *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidation in the Airline Industry*, 14 N.M.B. 388 (1987) ("*Merger Procedures*"), formalizing its procedures for exercising its exclusive jurisdiction over representation issues in airline mergers. Carriers are now required to notify the NMB at the same time that they seek merger approval from the Department of Transportation or when they subsequently decide to merge after one has gained control of the other. *Id.*, at 390, 393. Thus, the NMB has demonstrated its intent, ability, and authority to resolve any and all representation disputes arising from airline mergers. Reemphasizing the NMB's statutory role in such matters, the *Merger Procedures* reiterate that "the NMB alone is vested with final decision-making authority over representation issues." *Id.*, at 388; *see also id.*, at 389.

The courts have long held that under the RLA courts and arbitrators have no jurisdiction over representation

disputes, regardless of the context in which they arise, or the relief sought (including damages). Prior to this litigation over the Delta/Western merger, an unbroken line of appellate decisions established that the courts must look beyond the superficial form of a complaint to determine whether, as here, it masks an underlying representation dispute. If representation issues are involved, the courts are required to dismiss the complaint for lack of jurisdiction. *See, e.g., Independent Union of Flight Attendants v. Pan American World Airways*, 836 F.2d 130 (2d Cir. 1988) (per curiam) (seeking arbitration of a claim that union's contract governed work at another acquired airline); *Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (pre-merger action by union from smaller merging carrier for expedited arbitration of grievance over contract violation); *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (seeking declaration that union's contract survived a merger); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 19 (2d Cir. 1981) (action to enforce union contract on carrier's newly established subsidiary); *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (seeking negotiation of employees' post-merger rights); *Flight Engineers International Association v. Eastern Air Lines, Inc.*, 359 F.2d 303, 307 (2d Cir. 1966) (action seeking reinstatement of replaced striking employees "flew in the teeth" of NMB's certification of a different union representing the replacement employees); *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (seeking declaration that union's contract with successor provision survived a merger); *Flight Engineers' International Association v. Eastern Air Lines, Inc.*, 311 F.2d 745, 746 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963) (seeking injunction requiring airline to bargain); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th

Cir.), *cert. denied*, 369 U.S. 885 (1962) (seeking to enjoin agreement between railroad and parent union). In all of these cases, the courts found that the union's action raised representation issues and dismissed for lack of jurisdiction. Nothing in those decisions indicated that their outcome was affected by the form of relief sought by the union.

B. The Present Litigation Involves A Representation Dispute Within The Exclusive Jurisdiction Of The NMB, Regardless Of The Relief Sought

AFA's action seeking to arbitrate contractual grievances related to its alleged right to maintain its representative status is simply an attempt to evade the NMB's exclusive jurisdiction over representation questions. AFA claimed that the successor provisions contained in its collective bargaining agreement required Western to bind Delta to recognize AFA as the bargaining representative of the former Western flight attendants and to honor the Western/AFA labor contract after the merger. Since the D.C. Circuit's initial ruling that "[a]lthough [AFA's] claim based on any right of continued representation is moot, it is not clear whether an arbitrator could award damages. . . if the arbitrator finds that Appellee breached the collective bargaining agreement" (App. B, 25a), AFA now seeks an arbitration limited to damages relief.

The D.C. Circuit decision would allow the AFA to take its damages request to arbitration. The court below would distinguish between that damages remedy and the underlying representation claim:

> AFA's claims for injunctive relief are now moot, and no resolution of the remaining damage claim could have any effect upon either the Delta-Western merger or the representation of Delta's employees. This dispute is over a sum of money: Delta has it, and AFA wants it; no other person, and no transaction, is affected by which of them ends up with it.

App. A, 18a, 879 F.2d, at 914.

This puts the cart before the horse. One must look at the underlying claim before one can look at the remedy. A court does not have subject matter jurisdiction over a claim that one party desires another's money. Such a claim, without a proper cause of action as a predicate, would be dismissed for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In order to invoke a court's subject matter jurisdiction, a party must plead each of the elements of a cause of action that is within the court's jurisdiction. A cause of action founded upon breach of contract comprises four elements: a duty, a breach of the duty, proximate cause, and damages or injunctive relief. Similarly, a union's claim that it seeks a carrier's money would not, by itself, be subject to arbitration under the Railway Labor Act. The union must assert as a necessary element of its cause of action that the carrier had a duty to take some action, that it breached that duty, and that an arbitrator has jurisdiction to determine those issues. The remedy of damages is inextricably intertwined with the asserted duty and breach.

Here, AFA alleged that Western had a duty to bind a successor airline—in this case Delta—to recognize AFA's status as collective bargaining representative and its labor contract (or, under the alternate formulation of AFA's argument stated by the D.C. Circuit, that the merger was prohibited because of Delta's failure to agree to such recognition). Western (and Delta) disputed AFA's claim. That alleged duty is the subject matter of this dispute and of AFA's cause of action—the subject matter is not whether AFA can have some of Delta's money. The latter issue necessarily depends upon the former. That is, absent a finding of the alleged duty and a breach thereof, AFA would have no basis for any relief, including damages.

Any finding, whether by an arbitrator or a court, that AFA had a right to continued recognition would invade the NMB's exclusive jurisdiction over representation dis-

putes. One cannot separate the remedy which AFA seeks from its underlying representation claim, as the D.C. Circuit decision does.

The D.C. Circuit dismisses this argument by saying that, inasmuch as the merger was completed and the NMB already has ruled on the representation issues, a damage award could not interfere with or affect those matters. But the issue of subject matter jurisdiction does not depend upon whether a remedy can be devised that arguably will not "interfere" with the transaction. The issue is whether the adjudicator, be it a court or an arbitrator, has jurisdiction to determine the rights and obligations of the parties with respect to the disputed subject matter: here the asserted duty of Western to bind Delta to recognize the AFA contract and AFA as employee representative.

C. The D.C. Circuit's Decision In The Instant Case Conflicts With Every Other Appellate Decision Regarding The Effect Of Collective Bargaining Agreements On Employee Representation Issues In Airline Mergers and Acquisitions

In reviewing the Ninth Circuit's finding of jurisdiction and granting of an injunction compelling Western to arbitrate in the parallel litigation, Justice O'Connor discussed the long line of cases cited in Section A above:

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.
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> * * *
>
> The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely

> that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

App H, 44a, 46a, 480 U.S., at 1305, 1307. This Court subsequently granted certiorari, vacated the Ninth Circuit's decision and remanded to consider the question of mootness. App. J, 63a, 108 S. Ct. 53 (1987).

The Courts of Appeals of five circuits, the First, Second, Fifth, Sixth and Seventh, have ruled that the courts have no jurisdiction in actions to enforce union contracts in connection with airline mergers and acquisitions because such actions inevitably raise representation questions. The D.C. Circuit decision conflicts with these other circuits.

The Seventh Circuit's decision in *Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) ("*ALEA v. Republic*"), is especially instructive as its facts are indistinguishable from those here. In anticipation of a merger with Republic Airlines, Northwest Airlines agreed to recognize two of its own unions as representatives of the combined workforce after the merger was to take place. Before this "transition agreement" became effective, one of Republic's unions, the Air Line Employees Association ("ALEA"), brought an action prior to the merger against Republic and Northwest challenging the transition agreement as a breach of ALEA's labor contract with Republic. ALEA's complaint sought the same relief AFA sought here, "an order compelling expedited arbitration of its grievance challenging defendants' contract violations and preserving the *status quo* pending issuance of the arbitrator's decision." *Id.*, at 968.[1]

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[1] AFA's Complaint sought the same relief to "[o]rder Western to submit on an expedited basis to the jurisdiction of the System Board of Adjustment, sitting with a referee in accordance with the 1984 Agreement, to resolve the parties' dispute over the Company's asserted breach of Section 1(C)" and "if expedited arbitration before the System Board is not ordered, issue a

Thus, the Seventh Circuit had before it all of the same elements of the instant case, *i.e.*, a premerger contract action brought by the union against the premerger carrier to compel arbitration of a claim that the carrier violated the union's contract in the merger by not recognizing that union. The union there, like AFA here, sought to compel arbitration of an alleged contract violation, in which arbitration the union would be entitled to any appropriate relief, including damages. Nevertheless, unlike the D.C. Circuit, the Seventh Circuit affirmed the dismissal of ALEA's complaint for lack of jurisdiction:

> [T]he district judge's decision was in conformity with—as he put it—"the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint." . . . [W]e find no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits. . . . [*E*]*ven though the complaint was couched in terms of enforcing the collective bargaining agreement, the dispute was basically a representational dispute and therefore committed to the sole jurisdiction of the NMB.*

Id. (footnote and citation omitted) (emphasis added).

To the same effect is the Fifth Circuit's decision in *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983). After Texas International merged with the larger Continental Air Lines, Texas International's 1,800 Teamsters found themselves subsumed in an unorganized unit of 4,000 Continental employees, and Continental refused to recognize the Teamsters or their premerger agreement. Although

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preliminary injunction to preserve the *status quo* pending arbitration by the System Board of the parties' contractual dispute." (AFA Complaint, at 10, requests for relief). It should be noted that a complaint seeking an order compelling arbitration typically would not specify the nature of the relief sought in the arbitration. It is understood that, if the arbitrator has jurisdiction over a grievance, he may issue an order in the nature of injunctive relief, he may award damages, or both.

the Teamsters' declaratory action, like AFA's suit here, purported only to seek enforcement of the union's contract, the Fifth Circuit nevertheless held that the action for contract enforcement hinged on the underlying representation dispute. *Id.*, at 161. The court found as a consequence that it had no jurisdiction to intervene:

> Given the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements.

Id., at 164.

Since *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964), the courts have recognized that placing a representation issue in the form of a contract dispute cannot oust the NMB of its exclusive jurisdiction. There the union sought to enforce its premerger contract, which contained a successor clause, with United's merger partner. The Sixth Circuit affirmed lack of jurisdiction:

> [A]lthough the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction "where 'validity' of the contract depends upon the merits of a representation dispute."

325 F.2d, at 579 (citation omitted).

The same principles of these cases apply here. The D.C. Circuit's decision compelling arbitration of AFA's damages claim would authorize and require an arbitrator, in order to award damages, to determine first whether under the successor clause of the union's contract AFA was entitled to representation status after the merger. Thus, the D.C. Circuit would erroneously allow an arbitrator to decide a representation issue within the NMB's exclusive jurisdic-

tion, when the NMB has already decided that representation issue against AFA. The D.C. Circuit decision simply cannot be reconciled with the other circuit decisions.

D. The D.C. Circuit's Attempt To Distinguish All The Other Circuit Decisions Is Unavailing

The D.C. Circuit decision attempts to distinguish all the "cited [circuit] cases, however, since in each one (with a single exception discussed more fully below), the union sought not damages, but rather a declaration or an injunction that would have given it an ongoing right of representation." App. A, 16a, 879 F.2d, at 913. None of the many circuit cases upholding the exclusive jurisdiction of the NMB support the distinction between injunctive relief and damages. Nor do those cases suggest that damages relief might be allowed or that the form of relief makes any difference. Indeed, a number of the decisions are directly contrary to the purported distinction.

In *ALEA v. Republic, supra*, discussed more fully *supra* at page 15, the Seventh Circuit was faced with a union's request for an order compelling arbitration of the union's grievance over contract violations in a merger, just as the D.C. Circuit faced here. The claims of contract violations that the union there sought to arbitrate would have entitled them to damages and any other appropriate relief, if the union established a contract violation in arbitration. Damages were just as much a part of the relief available to ALEA in arbitration in that case as they are to AFA in the instant case. Yet, the Seventh Circuit affirmed the district court's refusal to compel arbitration and its dismissal of the complaint for lack of subject matter jurisdiction because "the complaint was basically 'a representational dispute over which the federal courts do not have jurisdiction.' Order, No. 86 C 5239 (N.D. Ill. July 28, 1986)." 798 F.2d, at 968. The fact that the union in *ALEA v. Republic* would have been able to seek damages in arbitration (*see* note 1, *supra*) did not make any difference as to court jurisdiction in that case, any more than it should have in the instant case.

Another similar case is the Second Circuit's *Independent Union of Flight Attendants v. Pan American World Airways, supra*. There, the union sought to compel arbitration of its claim that Pan Am violated its labor contract by not applying that contract to another newly acquired airline. There again if the court had ordered the matter to arbitration as the union sought, the union would have naturally been able to seek damages in arbitration if it could establish a contract violation. Nevertheless, the district court refused to compel arbitration for any relief and dismissed for lack of subject matter jurisdiction, and the Second Circuit "affirm[ed] for substantially the reasons stated by the district court. 664 F. Supp. 156 (S.D.N.Y. 1987)." 836 F.2d, at 131. As the district court stated:

> It is also generally recognized that labor relations problems after a merger or acquisition in the airline industry may in some instances straddle the Railway Labor Act's seemingly discrete lines of demarcation. That is, what may be characterized as a "minor" dispute over the interpretation of a contract may also implicate concerns which are representational in nature. Where the issues thus overlap, a jurisdictional problem arises. The proper course for a court to follow in such circumstances is to allow the National Mediation Board "alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Texas International Airlines*, 717 F.2d at 164. *See also Western Airlines*, 107 S. Ct. at 1517.
>
> * * *
>
> [A] decision on the contract issues will necessarily implicate representational concerns.

664 F. Supp., at 158, 159 (S.D.N.Y.), *aff'd*, 836 F.2d 130 (2d Cir. 1988). The possibility of damages relief which existed there, just as it did here, did not change the lack of court jurisdiction.

That case involved circumstances quite similar to the instant case; by the time the case got to the Second Circuit

the NMB had resolved the representation issue. The Second Circuit noted in reference to the NMB's having asserted jurisdiction:

> We believe that these events underscore the correctness of the district court's decision that representation issues within the jurisdiction of the Mediation Board are implicated in the instant matter.

836 F.2d., at 131.[2]

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[2] Following the Second Circuit decision in *Pan American, supra*, another Pan Am union amended its contract grievance and complaint for a similar claim over work at the newly acquired Ransome Airlines, so as to seek only damages, and sought to compel arbitration of that claim. *Flight Engineers' International Association v. Pan American World Airways*, No. 87-6694, slip op. (S.D.N.Y. July 5, 1989) ("*FEIA v. Pan American*") (*See* App. M, 67a). The court expressly rejected the distinction the D.C. Circuit would draw and dismissed for lack of jurisdiction:

> Plaintiff's attempts to distinguish *IUFA* and the present case ultimately turn upon the notion that seeking contractual damages calls for a different result than seeking the right to perform the work; that representational issues are not implicated in the former action, while they may be in the latter. The Court does not find this distinction determinative, and it does not strike at the essence of the *IUFA* opinion. The *IUFA* Court stated, "[i]n essence . . . [t]he IUFA flight attendants in this case claim, just as the pilots in *Air Line Pilots Ass'n v. Texas Intern. Airlines*, 656 F.2d 16 (2d Cir. 1981) claimed, that work on a related carrier should be assigned to them." That same basic question underlies any claim for past damages here; the union claims that work on a related carrier should have been assigned to them.
>
> Plaintiff seeks to isolate the damage issue from a determination of representation, but the inquiries are inextricable. In order to determine whether the plaintiff is entitled to damages, the court must first conclude that the union is entitled to the work. Deciding the representation issue is a necessary predicate to determining whether a con-

The D.C. Circuit acknowledged that in at least one case, *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), "a court specifically noted a union's claim for damages, 656 F.2d at 17, yet required dismissal of the action on the authority of *Switchmen's Union.*" App. A, 21a, 879 F.2d, at 916. The D.C. Circuit, nevertheless, drew the following distinction of that case from the present case:

> The case is not on point, however, because the union there was seeking a *judicial* award of damages, not an order compelling *arbitral* resolution of its money claim.

Id., 879 F.2d, at 916 (emphasis in original).

That artificial distinction between whether the damages are sought from a court or an arbitrator is one that the same Second Circuit did not observe in its subsequent case *Independent Union of Flight Attendants v. Pan American World Airways*, 836 F.2d 130 (2d Cir. 1988). Nor was that distinction followed in *ALEA v. Republic, supra*, or in *FEIA v. Pan American, supra* (*see* note 2, *supra*). All of these cases, like the present case, involved union actions to compel arbitration of contract violations which, if proven, would have entitled the union to relief, including any damages. Nevertheless, the courts declined to order arbitration of anything because the courts and an arbitrator lacked jurisdiction since a representation issue was involved.

No circuit court has drawn or even suggested either of the distinctions created by the D.C. Circuit. Nor has any district court to our knowledge. The D.C. Circuit's decision creates a direct conflict among the circuits regarding the jurisdiction of the courts, of the NMB and of arbitrators in connection with representation issues arising under the RLA. This Court must resolve that conflict which is of critical importance in airline and railroad mergers and acquisitions.

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tractual remedy of damages is appropriate.

App. M, 74a-75a, slip op., at 9-10 (footnote omitted).

II. THE DECISION BELOW CREATES A CONFLICT BETWEEN THE D.C. CIRCUIT AND THE NINTH CIRCUIT IN PARALLEL LITIGATION WITH RESPECT TO THIS SAME MERGER REGARDING WHETHER A UNION'S CLAIM FOR DAMAGES FOR ALLEGED BREACH OF A SUCCESSOR CLAUSE HAS BEEN RENDERED MOOT

The National Mediation Board's decision terminating all the Western unions' representation certifications, including AFA's, renders this action moot. AFA has attempted to revive its action by claiming entitlement to damages for purported breach of the successor clause and arguing that such damages claim is not moot. AFA's damages claim, however, is inseparable from AFA's other claims for relief and, like those other claims, the damages claim was rendered moot by the NMB's decision.

The D.C. Circuit opinion notes:

> Delta points out that the Ninth Circuit held that the *Teamsters* litigation was moot, 854 F.2d at 1178, even though the plaintiff unions there argued, as does AFA here, that even if their claims for injunctive and declaratory relief were moot, an arbitrator could still award damages for breach of the successorship clauses in their CBA's.
>
> The argument was indeed made in the briefs before the Ninth Circuit, yet in its *per curiam* order dismissing the *Teamsters* action, the court made no mention of it.

App. A, 9a, 879 F.2d, at 910.

The D.C. Circuit had before it the parties' briefs to the Ninth Circuit, in which the damages argument was fully made by the unions and responded to. However, the Ninth Circuit, in *IBTCHWA II*, rejected that damages argument and dismissed the entire action as moot (including the damages claims) on the basis that "none of the relief sought in the original complaint is now available." App. K, 65a, 854 F.2d, at 1178.

The D.C. Circuit acknowledges the split between its decision and the Ninth Circuit's:

> Were the Ninth Circuit decision binding precedent in this circuit, it might give us greater cause for concern, since its judgment necessarily, if implicitly, rejected all of the arguments that the unions made.

App. A, 9a, 879 F.2d, at 910. The split between the two circuits could not present a clearer or a more compelling case for review: the two decisions involve the same merger and the same arguments, and the Air Transport Employees union even had the same successor clause language as AFA. *IBTCHWA I*, 813 F.2d 1359, 1360 (9th Cir.), *vacated and remanded*, 108 S. Ct. 53 (1987). Thus, Delta and this same merger of Western into Delta will be subject to two totally inconsistent rulings of law on the same issue. Only this Court can resolve this conflict.[3]

Before reaching the issue of a damage remedy, an arbitrator would first have to conclude that the successor clause bound Western to require Delta to recognize AFA and to assume AFA's collective bargaining agreement following the merger or, under the alternate formulation of AFA's arguments, that the merger was prohibited because of Delta's failure to agree to such recognition. Either interpretation presumes that AFA had a vested contractual right to continued representation of the former Western flight attendants following the merger. Absent an entitlement to such representation, AFA would have no basis

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[3] *See Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (denial of certiorari vacated and certiorari granted after conflict arose between two circuits on same legal issue involving same accident); *Maryland v. United States*, 381 U.S. 41 (1965) (certiorari granted to resolve conflict between two circuits on same legal issue involving same airline accident and same record); *International Typographical Union v. NLRB*, 365 U.S. 705, *rehearing denied*, 366 U.S. 941 (1961) (certiorari granted in both cases to resolve conflict between two circuits concerning lawfulness of same collective bargaining agreement clause).

for *any* relief, including a damage claim. Any holding that AFA or its contract was entitled to recognition by Delta, however, would eviscerate the NMB's ruling that AFA was *not* entitled to representation rights following the merger—and would encroach upon the NMB's exclusive jurisdiction. Thus, the D.C. Circuit's decision allowing an arbitrator to consider AFA's damages claim would affirmatively contradict the NMB's decision by authorizing damages for Delta's failure to recognize AFA, despite the NMB's determination that AFA was not entitled to recognition.

In addition, since the NMB's decision was retroactive to the date of the merger on April 1, 1987, there was never any period following the merger when AFA or its labor agreement was entitled to recognition or, conversely, any period when AFA could have been damaged by Delta's failure to recognize it. Even if Western had done precisely what AFA says the labor contract required, *i.e.*, obtained Delta's voluntary recognition of AFA and its union contract, any such recognition would have been futile. Any voluntary recognition by Delta would have been rendered unenforceable at its inception by the NMB's ruling, precluding any accrual of damages.

While the NMB has acknowledged that, under some limited circumstances, a carrier may voluntarily recognize a representative for a group of employees which does not constitute a system-wide craft or class, an NMB determination of the representative status of the overall craft or class supersedes any such voluntary recognition. *Seaboard Coast Line Railroad Co.*, 6 N.M.B. 63 (1976). As the NMB explained in *Galveston Wharves*, 4 N.M.B. 200 (1962):

> This restriction [that the NMB can only certify representatives on a carrier-wide basis] upon the Board does not preclude a carrier from voluntarily recognizing a particular union as a representative of a group or groups of employees which may not constitute a generally recognized craft or class. *But, when a dispute over representation is brought before the Board,*

> *the legislative procedures take precedent* [*sic*], *and the craft or class must be the controlling factor in its determination*. Therefore private representation agreements which do not conform to the recognized craft or class lines cannot be relied upon to modify the requirements of the statute.

Id., at 203 (emphasis added).

In the instant case, the NMB ruled that the merger of Western into Delta created a single transportation system and that AFA's certification as the representative of former Western employees was terminated on the date of the merger. Thus, any voluntary recognition previously obtained by Western from Delta (and any entitlement to damages for failure to do so) would have been superseded and rendered ineffective at the very moment it was supposed to become effective upon the merger.

The NMB decision in *Midway Airlines*, 14 N.M.B. 447 (1987), demonstrates that any voluntary recognition agreement entered into by Delta would have been ineffective at its inception. *Midway* involved the merger of Midway Airlines ("Midway") and its subsidiary, Midway Airlines (1984) ("Midway 1984"). Similar to Delta, Midway invoked the NMB's jurisdiction under the *Merger Procedures* to determine whether the certifications of the unions at Midway 1984 would be terminated by the merger.

Prior to development of the merger plans, however, a separate subsidiary, Midway Aircraft Engineering ("MAE"), had been set up to perform heavy maintenance work, and MAE was to remain a separate subsidiary following the merger. The labor agreement between the International Brotherhood of Teamsters ("IBT") and Midway 1984 required voluntary recognition of the IBT as the separate collective bargaining representative of certain Midway 1984 employees in Miami in the event that MAE took over operation of Midway 1984's Miami maintenance facility. 14 N.M.B., at 452-53. As part of the merger plans, the Miami facility and employees were to be transferred to MAE and, in accordance with the Midway 1984 agree-

ment, MAE recognized the IBT as the separate post-merger representative of the MAE Miami employees.

That voluntary recognition of the IBT by MAE was nullified by the NMB. The NMB, after examining the applicable factors, found that Midway, Midway 1984 and MAE constituted a single transportation system for purposes of the RLA and could have but a single representative covering each combined craft or class. 14 N.M.B., at 460. The Board held that the transfer of employees to MAE was ineffective to "deprive them or others of their rights under the Railway Labor Act" to have a single system-wide and craft-wide representative. *Id.*

The same outcome would have occurred in the instant case, even if Western had obtained Delta's recognition of AFA as the post-merger representative for the former Western employees. *Midway* demonstrates that any such recognition by Delta, and therefore any damages based on an entitlement to such recognition, would have been nullified effective April 1 by the NMB's decision.

Thus, the NMB decision does render moot AFA's entire action, including any damages claim. The Ninth Circuit rejected the same damages argument made by two other Western unions and dismissed their parallel actions as moot, after this Court remanded those cases to the Ninth Circuit precisely to consider the question of mootness.[4] Now that the Ninth and D.C. Circuits have decided that mootness question inconsistently, only this Court can resolve that conflict on the important legal question the Court itself raised.

III. THIS CASE PRESENTS ISSUES OF NATIONAL POLICY CRITICAL TO THE VITAL AIR AND RAIL TRANSPORTATION INDUSTRIES

AFA sought to avoid the mandatory NMB processes, including its employee election procedure, by seeking ju-

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[4] The question of damages had been raised before this Court by the Teamsters in the parallel actions in the Ninth Circuit in the Teamsters' Brief In Opposition to Delta's Petition for a Writ of Certiorari, at 12.

dicial and arbitral relief instead. By permitting such forum shopping and endorsing the intervention of the federal courts and labor arbitrators in representation disputes, the decision of the D.C. Circuit conflicts not only with the other circuits, but with the purposes of the RLA.

The D.C. Circuit decision permitting arbitration where representation issues are involved would allow the possibility or mere threat of an arbitrator's award of damages to unions to affect the outcome of such representation disputes and lead to fragmentation of the carrier's system-wide craft or class bargaining units provided for by the RLA. The imposition or mere threat of large damages awards by arbitrators over successor provisions purportedly governing representation issues in mergers and acquisitions would cause airlines and railroads to depart from the carrier-wide bargaining units provided for by the RLA. Damages can be just as influential of the parties' conduct as injunctive orders in causing such fragmentation.

The RLA provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Fourth. As the NMB explained in the *New York Central Railroad Co.*, 1 N.M.B. 197, 209-10 (1941), single representation for a craft or class on a carrier-wide basis was mandated by Congress, and splitting a craft or class contravenes the legislative directive. *See also Seaboard Coast Line Railroad Co.*, 6 N.M.B. 63, 64-65 (1976).

The NMB has consistently refused to fragment crafts or classes in exercising its jurisdiction in airline merger cases because of its RLA mandate to preserve employee relations stability in the vital transportation industries. It has also recognized that such fragmentation would preclude effective integration of a combined carrier's post-merger operations into a single transportation system. *Republic Airlines, Inc.*, 8 N.M.B. 49, 54-55 (1980). Effective integration of a post-merger labor force is impossible where some employees are represented by a union, while others,

performing the same job alongside union members, are not. Different work rules and terms and conditions of employment would apply to employees doing the same jobs at the same locations, and the inefficiencies of such an operation would be totally inconsistent with the original purpose of the merger. *See International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983).

Airline mergers, acquisitions, international marketing agreements and other related transactions have become and continue to be increasingly frequent events in the transportation industry, impelled in large part by heightened competition resulting from airline deregulation and by the recognition that the economy of the United States is increasingly linked to the international economic order. These transactions involve the integration of thousands of employees and hundreds of millions of dollars in assets. They affect systems which transport many millions of persons and tons of cargo annually. Any disruption to the effective employee integration of carriers in this vital industry, such as that threatened by the D.C. Circuit decision, is of national concern. The fragmentation of the adjudicatory processes and jurisdictional rules governing labor relations and collective bargaining obligations in this area, which would be authorized by the D.C. Circuit decision, is likewise of national importance. The decision would also inhibit the merger or acquisition of failing carriers leading to their disruptive demise. Moreover, because the decision is under the RLA, it could lead to similar effects upon the critical railroad industry as well.

The D.C. Circuit's decision cannot be viewed as merely an isolated, localized or technical construction of the law. Many airlines, such as Delta and Western, are subject to suit in several circuits, including the D.C. Circuit, because of their extensive operations. Further, most union contracts in the airline industry contain successor provisions, or other provisions that might be construed to empower arbitrators to decide representation issues, as the AFA would construe its contract here. The combination of these

factors not only subjects airlines to the disruptions caused by the D.C. Circuit's invasion of the NMB's jurisdiction, but also potentially subjects them to conflicting requirements in different circuits with regard to the *same* transaction.[5]

It was precisely to avoid such conflicts, and the resulting fragmentation of the carrier's labor force, that Congress vested exclusive jurisdiction over representation disputes in the NMB. It is intolerable for the NMB's exclusive jurisdiction over representation disputes arising in airline and railroad mergers to be recognized in the First, Second, Fifth, Sixth and Seventh Circuits, but not in the D.C. Circuit. It is just as intolerable for any damages claim in this merger to be moot in the Ninth Circuit, but not in the D.C. Circuit.

With so much at stake in the transactions involving air and rail carriers, the interests of the parties involved and those of the general public require that the issues raised here be definitely resolved, and that this previously settled area of labor law be put right again. The confusion caused by the D.C. Circuit's ruling in the instant merger alone is of national concern, but, even more broadly, the questions raised here are certain to arise again as pending and future transactions are consummated in the airline and

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[5] The instant merger illustrates how those inconsistencies arise. On the same day (March 31, 1987) that the Ninth Circuit issued its decision compelling arbitration of two other unions' grievances and enjoining the Delta-Western merger, the D.C. Circuit *denied* AFA's motion to compel arbitration pending appeal, which was brought on a legal theory identical to those advanced by the ATE and IBT unions in the Ninth Circuit. App. C, 26a. Later, after this Court vacated the Ninth Circuit's decision and remanded on the question of mootness, the Ninth Circuit found the entire case, including any damages claim, to be moot. But the D.C. Circuit decision here found that the AFA's damages claim was not moot, acknowledging that its decision was at odds with the Ninth Circuit's decision. Thus, Delta is presented with the situation that different results have been reached by two circuits on the same legal issue in the same merger.

railroad industries. It is therefore most important that the Court finally resolve these questions.

CONCLUSION

For the foregoing reasons, Delta respectfully requests that this Petition be granted.

September 15, 1989

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APPENDICES

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 1988 Decided July 18, 1989

No. 87-7040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
APPELLANT

v.

DELTA AIR LINES, INC.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-00040)

Deborah Greenfield, for appellant. *David A. Borer* entered an appearance for appellant.

Scott A. Kruse, with whom *Michael H. Campbell*, *Paul D. Jones*, *Robert S. Harkey* and *William J. Kilberg* were on the brief, for appellee. *Baruch A. Fellner* entered an appearance for appellee.

Before: MIKVA, BUCKLEY, and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: This appeal arises from a labor dispute involving the 1987 merger of Western Airlines, Inc. into Delta Air Lines, Inc. The Association of Flight Attendants, which represented Western's flight attendants prior to the merger, filed suit in the district court seeking an order compelling Western to arbitrate the question whether Western breached the "successorship clause" in its collective bargaining agreement (CBA) with AFA by failing to bind Delta to the Agreement. The district court dismissed the action, holding that it involves a representative dispute under § 2, *Ninth* of the Railway Labor Act, 45 U.S.C. § 152, *Ninth*, and thus comes within the exclusive jurisdiction of the National Mediation Board. 662 F. Supp. 1, 3 (D.D.C. 1987).

The Union appealed and, as discussed below, on Western's motion, we held that some of AFA's claims for relief are moot. The questions now before us are (1) whether AFA's remaining claim is moot in light of the consummation of the Delta-Western merger and the subsequent determination by the NMB retroactively to extinguish AFA's certificate as bargaining representative for Western's flight attendants; and (2) if AFA's remaining claim is not moot, whether the district court has subject matter jurisdiction over it.

I. FACTUAL BACKGROUND

Prior to its acquisition by Delta, Western entered into a CBA with the Union, in which it recognized AFA "as the duly designated bargaining agent for the Flight Attendants in the employment of [Western]," and as re-

quired by the Act, 45 U.S.C. § 184, established a System Board of Adjustment "for the purpose of adjusting and deciding disputes which may arise under the terms of the Flight Attendant's Agreement . . . ." The agreement conferred upon the System Board "jurisdiction over disputes . . . growing out of grievances or out of interpretation of [or] application of any of the terms of the Flight Attendants' Agreement."

In addition to these essentially standard terms, the CBA contained the following successorship provision:

> This agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the Railway Labor Act, as amended.

In September 1986, Western entered into a merger agreement with Delta. Under the terms of this agreement, the merger would be affected in two steps: (1) on December 18, 1986, Delta would acquire 100% control of Western; and (2) on April 1, 1987, Western would be merged into Delta and cease to operate as a separate entity. The merger agreement provided that Western would honor its CBAs as long as they remained in effect, but did not purport to bind Delta to Western's CBAs.

In October 1986, AFA filed a grievance against Western. Specifically, AFA asserted that Western had a contractual duty to bind any successor to the CBA and that it breached that duty by agreeing to merge with Delta without so binding it. Western denied the grievance on the ground that it raised "representation issues within the exclusive jurisdiction of the National Mediation Board." AFA then submitted the dispute to the System Board, but Western refused to arbitrate.

Shortly after the first step of the merger took effect, AFA brought this action in the district court to compel

arbitration. In its complaint, AFA alleged that its grievance raised a "minor dispute" under the RLA and thus fell within the jurisdiction of the System Board. AFA sought an order directing Western to submit to expedited arbitration before the System Board for a determination whether it had breached the CBA, or in the event that the court did not expedite arbitration, preserving the status quo pending proceedings before the System Board.

In a memorandum submitted to the district court in support of its motion for summary judgment, AFA suggested that in the event the System Board were to rule in its favor, available relief might take the form of: (1) an order binding Delta to the terms of the CBA, "including the provisions recognizing AFA" as the exclusive representative of Western's flight attendants; or (2) an order requiring Western (a) to bind Delta to the CBA as a condition of its consummating the merger; and (b) to continue to operate as a separate entity; or (3) a declaration that without a term in the merger agreement binding Delta to the CBA, the merger could not occur; or (4) a determination that Western would be required to respond in damages in the event that it failed to bind Delta to the CBA.

In February 1987, the district court dismissed the action on the ground that AFA's complaint raised a "representation dispute" within the exclusive jurisdiction of the NMB. 622 F. Supp. at 3. Accordingly, the court held that it lacked jurisdiction to grant the relief sought by AFA, and dismissed the action with prejudice. AFA then filed the appeal now before us.

While AFA was pursuing this action in the district court, two other Western unions challenged the Delta-Western merger in the District Court for the Central District of California. They, too, sought both an order compelling arbitration of their claim that Western had breached the successorship clauses in their CBAs by fail-

ing to bind Delta to those agreements, and an injunction against consummation of the merger pending arbitration. The district court denied the requested relief, but the Ninth Circuit, on March 31, issued an order (1) directing the district court to enter orders compelling arbitration; and (2) enjoining the merger until either (a) completion of arbitration proceedings; or (b) entry of a stipulation by Western and Delta that the result of the arbitration would bind the successor corporation. *IBTCWHA v. Western Airlines, Inc.* (*Teamsters*), 813 F.2d 1359, 1364 (9th Cir. 1987). On April 1, however, the scheduled date of the operational merger, Justice O'Connor granted the carriers' *ex parte* application for a stay of the Ninth Circuit's order. 480 U.S. 1301 (1987) (in chambers). With the injunction thus lifted, the second step of the Delta-Western merger took place as planned, Western ceased to exist as a separate operating entity, and Delta refused to recognize either the CBA or AFA's status as the representative of the former Western flight attendants.

Shortly thereafter, Delta petitioned the NMB to "determine whether the Board's certifications of the Western labor organizations as collective bargaining representatives of the various crafts or classes at Western have been extinguished or terminated effective April 1, 1987." *In re Delta Air Lines, Inc. and Western Air Lines, Inc.*, 14 N.M.B. 291 (1987). On July 9, the NMB ruled that, the merger having eliminated Western as a separate operating identity, the certifications of the Western unions (including AFA) that represented a minority of their crafts in the merged entity were extinguished retroactively to April 1. *Id.* at 301.

On October 5, 1987, the Supreme Court granted *certiorari* in the *Teamsters* litigation, vacated the decision of the Ninth Circuit, and remanded the case for that court to consider whether it was moot. 108 S. Ct. 53 (1987). Thereafter, the Ninth Circuit, having requested and re-

ceived briefing on the issue of mootness, issued a *per curiam* order dismissing that action as moot. 854 F.2d 1178 (9th Cir. 1988).

Meanwhile, Delta had moved to dismiss this appeal on the ground that the NMB's retroactive decertification of AFA rendered it moot. Another panel of this court held, on June 6, 1988, that "Appellant's claim based on any right of continued representation" was moot, but that it was "not clear whether an arbitrator could award damages for breach of the collective bargaining agreement." Accordingly, the court denied Delta's motion but ordered the parties to limit their briefs to that issue. We turn now to the question left open in our order of June 6.

II. MOOTNESS

By virtue of "the constitutional command that the judicial power extends only to cases or controversies," a federal court lacks jurisdiction over a case that has become moot. *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969). A case is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," but as long as some issues remain alive, "the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 496, 497.

Even though a claim for injunctive or declaratory relief has been rendered moot by intervening events, which our June 6 order indicates happened here, a claim for damages keeps the controversy alive if that claim "is not so insubstantial or so clearly foreclosed by prior decisions that th[e] case may not proceed." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8-9 (1978). *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 459 (1957) (request for order to arbitrate not moot because arbitrator could award damages); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 441-42 (1984). Thus, the question whether the consummation of the merger and the decertification of

AFA rendered this case moot turns upon whether AFA appears to state a claim upon which it could recover in arbitration an award of damages against Western for breach of the successorship provision in the CBA.

Delta's principal argument is that in order to award damages to AFA, the arbitrator would first have to find that the CBA entitled the Union to represent Western's flight attendants after the merger; and that any such finding would contravene the NMB's determination to decertify AFA as of the merger date, thus "encroach[ing] upon the NMB's exclusive jurisdiction" over representation disputes. Since the NMB has already exercised its jurisdiction with respect to the Delta-Western merger, the argument runs, this court no longer has the power to grant the relief that AFA seeks, *viz.*, an order compelling Delta to arbitrate the Union's grievance.

Delta's argument is framed in terms of mootness, but it necessarily implicates the statutory question whether AFA's claim for damages is within the exclusive jurisdiction of the NMB, since if it is not, the predicate underlying Delta's argument would fail. Although that question could plausibly be resolved on mootness grounds, we think it is more properly addressed in terms of the district court's subject matter jurisdiction over the damage aspect of this case. *Cf. Marshall v. Local Union No. 639, Int'l Brotherhood of Teamsters*, 593 F.2d 1297, 1301 n.16 (D.C. Cir. 1979) (court may decide issue of subject matter jurisdiction where both jurisdiction and mootness questions are raised and where "the two are partially interlocked"). As set forth in Part III below, we conclude that the district court has jurisdiction over AFA's damage claim.

Delta argues in the alternative that even if the district court has jurisdiction, AFA cannot possibly demonstrate a claim for damages because (1) at all times prior to April 1, Western properly recognized AFA under the

terms of the CBA; and (2) the NMB's decertification of AFA divested it of any right it may have had to enforce its agreement with Western after that date. Delta also argues, in a similar vein, that even if the successorship clause of the CBA required Western to bind Delta to that agreement, Delta's voluntary recognition of AFA would, by virtue of the NMB's retroactive decertification of AFA, be "superseded and rendered ineffective at the very moment it was supposed to become effective upon the merger."

Neither of these arguments is entirely responsive to the issue. AFA does not now dispute that the NMB's decertification order deprived it of any right to represent Western employees beyond the April 1 merger date, and this court has already held that any claim seeking to assert such a right would be moot. That AFA no longer has the right to specific enforcement of the successorship clause, however, simply does not answer the question whether Delta is answerable in damages for Western's alleged pre-merger breach of that clause. (Delta does not dispute that, as a general rule, grievances arising before expiration of a CBA survive and continue to be governed by its terms. *See Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945). *Cf. Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 250-52 (1977) (same under NLRA)).

Assuming, as we must in this context, that Western was obliged by the successorship clause to bind any merger partner to the CBA, an arbitrator might find that Western was required to structure the merger so as to preserve itself as a separate operating entity. In that event, the arbitrator might also find that the NMB's determination to extinguish AFA's certification as representative of the former Western flight attendants was a foreseeable consequence of Western's breach, and that the carrier is liable to AFA for its

contract damages. The situation would be no different analytically if the CBA had expressly provided for a sum of liquidated damages in the event that Western breached the successorship clause. Neither of Delta's theories explains why the arbitrator could not award relief in the form of damages based upon such a breach.

Delta points out that the Ninth Circuit held that the *Teamsters* litigation was moot, 854 F.2d at 1178, even though the plaintiff unions there argued, as does AFA here, that even if their claims for injunctive and declaratory relief were moot, an arbitrator could still award damages for breach of the successorship clauses in their CBA's.

The argument was indeed made in the briefs before the Ninth Circuit, yet in its *per curiam* order dismissing the *Teamsters* actions, the court made no mention of it. Indeed, the court characterized the relief requested as merely "an order compelling Western to arbitrate and an injunction prohibiting the merger," and concluded that in light of the intervening consummation of the Delta-Western merger, "none of the relief sought in the original complaint is now available." *Id.* Were the Ninth Circuit decision binding precedent in this circuit, it might give us greater cause for concern, since its judgment necessarily, if implicitly, rejected all of the arguments that the unions made. Because the court did not explain why it rejected the unions' argument that their damage claim was live, however, its decision adds no persuasive force to the arguments already advanced by Delta in this action.

For the reasons given above, we conclude that AFA's damage claim is not "so insubstantial or so clearly foreclosed by prior decisions that th[e] case may not proceed," *Memphis Light*, 436 U.S. at 8-9, and turn to the question of the district court's subject matter jurisdiction over that claim.

[9]

III. JURISDICTION

Section 2, *Fourth* of the RLA, which establishes the right of covered employees to bargain collectively, also provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." 45 U.S.C. § 152, *Fourth*. Section 2, *Ninth* of the Act provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees . . ., it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. § 152, *Ninth*. Section 2, *Ninth* further provides that upon receipt of a certification from the RLA, "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." *Id.*

In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the Supreme Court held that the NMB's power to resolve "any dispute . . . among a carrier's employees as to who are the representatives of such employees" is exclusive. *Id.* at 303. The right of a majority of the employees to choose the bargaining representative is protected by the NMB's certification power under § 2, *Ninth*, to the exclusion of any concurrent judicial protection. *Id.* at 301.

In reaching this conclusion, the Court looked to the structure and legislative history of the RLA, and there found that Congress has consistently expressed a strong preference for "conciliation, mediation, and arbitration," providing judicial remedies only in specific narrow circumstances. *Id.* at 302. Against that background, the

Court concluded that "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Id.* The Court further noted that Congress intended the NMB finally to resolve "jurisdictional disputes between unions," and concluded that "if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain." *Id.* at 303.

The Court then found that a district court has no power either to review the NMB's certification of a representative, or to make such a certification itself, but that it does have the power, which the Board itself lacks, to enforce the NMB's certification:

> The Mediation Board makes no "order." And its only ultimate finding of fact is the certificate. The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree.

Id. at 304.

The Court's opinion in *Switchmen's Union* leaves open two questions central to this dispute. First, apart from a challenge by one union to the merits of the NMB's certification of another union, such as that case presented, what types of claims constitute "jurisdictional disputes" and are thus within the NMB's jurisdiction? Second, may a party laying claim to a remedy that the NMB cannot give seek relief elsewhere, either through court-ordered arbitration, or in the district court itself?

The Court suggested an answer to the second question in *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 297 (1943) (*M-K-T*), a companion case to *Switchmen's Union* involving a dispute between two unions, representing separate crafts of locomotive employees, over the correct system for handling

cross-assignments and promotions from one craft to another. Although the precise question presented in *M-K-T*, as in *Switchmen's Union*, was whether a court could hear a representation dispute between two unions, the Court strongly suggested that arbitration is available for the pursuit of a remedy unavailable from the NMB.

The Court again noted that in enacting the RLA, Congress "entrusted large segments of this field to the voluntary process of conciliation, mediation, and arbitration," while singling out only certain disputes, such as those covered by § 2, *Ninth*, for resolution by the NMB (aided by judicial enforcement of any certification so obtained). 320 U.S. at 332. The Court then concludued that a jurisdictional dispute was not properly brought into court if, although not within the jurisdiction of the NMB, it could be resolved through arbitration:

> However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken . . ., the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife.

Id. at 336-37. The Court emphasized that whatever the proper scope of the NMB's jurisdiction, "[b]eyond the mediation machinery furnished by the Board lies arbitration." *Id.* at 332.

Switchmen's Union and *M-K-T* lay down several principles relevant to the present dispute. First, the Court

made it perfectly clear in both cases that only the NMB may certify an employee representative. Second, the Court in *Switchmen's Union* suggested that the scope of the NMB's power under § 2, *Ninth*, is narrowly limited to determining the representative and issuing its certificate. Finally, the Court's analysis in *M-K-T* strongly suggests that if a dispute is not governed by § 2, *Ninth* it is not precluded, but rather may be pursued through the voluntary processes, such as arbitration, that Congress made the norm.

These principles do not resolve, but they do inform, our resolution of the precise issues before us, which are: (1) whether AFA's remaining claim raises a "dispute . . . as to who are the representatives of [Western's] employees" within the meaning of § 2, *Ninth* of the RLA; and (2) assuming this action is not technically within the NMB's jurisdiction, whether the relief sought by AFA is nonetheless precluded on the ground that the complaint raises—as Delta calls them—"representation issues."

A. *Jurisdictional disputes*

All of the courts of appeals to have considered the issue (as this court has not) have held that the question whether a union's certification survives an airline merger is a matter within the exclusive jurisdiction of the NMB. *See International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir. 1976); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981); *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Brotherhood of Ry. Clerks v. United Air Lines, Inc.*, 325 F.2d 576, 579-80 (6th Cir. 1963); *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986). The result is no different if the union frames its action as a contract dispute arising from a successorship clause in a CBA. A claim seeking

either specific performance of such a clause or a declaration that it is binding is nonjusticiable because the relief sought is, in effect, a certification within the meaning of § 2, *Ninth*; and as such, it is within the exclusive competence of the NMB. *See, e.g., Brotherhood of Ry. Clerks*, 325 F.2d at 579-80. *See also Texas Int'l Airlines*, 717 F.2d at 162 ("The form of the complaint [does] not control, for the substance of the dispute in fact involve[s] the question of representation of the employees."); *Brotherhood of Ry. Clerks*, 325 F.2d at 579 ("Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute.' ") (citation omitted).

The principle that a court lacks power to declare, even in an action framed so as to sound in contract, whether a union may continue to represent employees in the post-merger context, is supported, if not compelled, by the Supreme Court's analysis in *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943). There one of the carrier's unions sought a declaratory judgment invalidating a CBA insofar as it purported to designate another union as the representative of certain employees. The Court held that the action, though framed as a dispute over the validity of the CBA, was in substance a "jurisdictional dispute," since it "raise[d] the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer." *Id.* at 343. Seeing "no reason for differentiating this jurisdictional dispute from [those involved in *Switchmen's Union* and *M-K-T*]," the Court held that it fell within the exclusive jurisdiction of the NMB. *Id.* at 343-44.

Application of the *Southern Pacific* principle to an action seeking either injunctive or declaratory relief with respect to the successorship clause of a CBA clearly advances the policies underlying the RLA, as implemented

by the NMB. Congress entrusted the NMB with exclusive power to resolve representation disputes between unions because of the inherent divisiveness of such disputes and the strong interest of the parties in nonetheless "get[ting] the matter settled." *Switchmen's Union*, 320 U.S. at 303.

The NMB has in turn adopted the rule that when two or more airlines merge their operations, the certificate of any union representing only a minority of the relevant employees of the merged carrier is extinguished, to be replaced by whatever new certificate the NMB may grant with respect to representation of the employees of the merged entity as a whole. *Republic Airlines, Inc. and Hughes Air Corp.*, 8 N.M.B. 49, 54-55 (1980). As Judge Rubin of the Court of Appeals for the Fifth Circuit explained in the context of a merger between a unionized airline and a non-union airline, post-merger judicial enforcement of any provision of a pre-merger CBA would undermine the NMB's rule, because it would necessarily entail the union's continued representation of its former constituents, regardless of whether they constitute a majority of their class in the merged enterprise; as a result, some employees could be represented while others in the same class would not be. *Texas Int'l Airlines*, 717 F.2d at 163. For a court even to "grant injunctive relief maintaining the staus quo if the underlying dispute is representational in nature" would be problematic, the court observed, "because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representational issue." *Id.* at 161. The court therefore inferred "a congressional intent to allow [the NMB] alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164.

Relying on the cases canvassed above, Delta argues that AFA's claim raises a representation dispute under § 2, *Ninth*, and that as a result "[a]ny order of this Court

or any award of an arbitrator in AFA's favor in this dispute inevitably would invade the NMB's exclusive jurisdiction over representation issues and exceed the Court's or the arbitrator's jurisdiction." Delta's conclusion is not compelled by the cited cases, however, since in each one (with a single exception discussed more fully below), the union sought not damages, but rather a declaration or an injunction that would have given it an ongoing right of representation—truly the functional equivalent of the certificate that the NMB alone can issue. The courts found, quite sensibly, that these nominal contract claims were *de facto* claims to judicial certification of the plaintiff union's representative status. To entertain such a case would not only violate the spirit of the Supreme Court's teaching, it could also create a situation where, contrary to NMB policy, employees working side by side would be represented by different unions (or some would be represented and others not) and subject to diverse terms of employment.

An award of damages for a past breach of contract, on the other hand, would not have those untoward results. First, the NMB's policy of revoking a minority union's certificate as of the date of an operational merger would not be affected if it were later determined that the carrier, by agreeing to the terms of the merger, had breached its CBA. The merger would not be undone; the old CBA would not be reinstated; all employees in any one craft would still be subject to uniform terms of employment. Second, an award of damages would have no effect on the NMB's certification determination. The plaintiff union's pre-merger status as representative would not be revived, nor could any factual finding by an arbitrator in a damage action for breach of the CBA either overturn or predetermine the NMB's decision certifying a post-merger representation. Finally, a damage award, unlike prospective relief, would not cause any confusion as to which union is the proper post-merger representative.

The NMB would make that determination as usual; the employees would continue to be represented by the sole representative it has certified; and any failure on the part of the employer to "treat with" the certified representative would be remediable in federal court, regardless of any determination that the arbitrator might make in the course of deciding the damage case.

Delta points, however, to Justice O'Connor's opinion staying the injunction in the *Teamsters* litigation, and notes that although there was a damage issue in that case, Justice O'Connor nonetheless looked to the "great weight of the case law" holding that "disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board." 480 U.S. at 1305. Delta would have us read Justice O'Connor's opinion as standing for the unqualified proposition that (in the carrier's words) all "disputes over labor contract successorship clauses are within [the] NMB's jurisdiction."

We do not read Justice O'Connor's opinion so broadly, however. The only issue before the Justice was the propriety of the Ninth Circuit's order enjoining the merger pending the outcome of arbitration. In that posture, the case warranted her expedited attention only because of the disruptive effect of the injunction; her opinion focuses accordingly on the nature and consequences of the emergency relief that the unions sought. For example, the opinion notes, quoting Judge Rubin in *Texas Int'l Airlines*, 717 F.2d at 161, 164, that even a status quo injunction "would necessarily have the effect, at least during the period of the injunction, of deciding the representational issue," and that Congress intended the NMB "alone to consider the post-merger problems that arise from existing collective bargaining agreements." 480 U.S. at 1306. Although the opinion comments favorably upon the decision of the district court in the case now before us, that

decision had given no hint of a damage claim lurking behind the injunction then of immediate concern, and Justice O'Connor's opinion therefore understandably describes AFA's complaint only as one "seeking an order compelling Western to submit to arbitration . . . and enjoining the merger pending completion of [arbitral] proceedings." *Id.* at 1306-07. It is thus plain enough that Justice O'Connor was addressing only the issue directly before her, and had no occasion to consider, much less to rule upon, the question whether a claim for damages might survive a merger after her order staying the injunction.

As this case currently stands, it simply does not raise the concerns set forth in Justice O'Connor's opinion. AFA's claims for injunctive relief are now moot, and no resolution of the remaining damage claim could have any effect upon either the Delta-Western merger or the representation of Delta's employees. This dispute is over a sum of money: Delta has it, and AFA wants it; no other person, and no transaction, is affected by which of them ends up with it.

We do not see here a jurisdictional dispute within § 2, *Ninth* of the RLA. Neither the certification (or decertification) of a representative, nor the functional equivalent thereof, nor anything even remotely akin thereto, is at stake. Thus, we turn to the only other issue that Delta seeks to interpose between AFA and its demand to arbitrate its damage claim, *viz.*, whether, even in the absence of a jurisdictional dispute, § 2, *Ninth* by implication bars arbitration of any dispute that raises a "representation issue." We now turn to that question.

B. *Representation issues*

Delta's argument proceeds from the premise that "[w]hen a representation issue is shown to exist in the course of other legal proceedings, the court immediately must dismiss the legal action and require the parties to

proceed, if at all, before the NMB." From that Delta reasons that because AFA's complaint raises "issues" of representation, neither the district court nor an arbitrator may hear it; even if it does not raise a true "jurisdictional dispute," that is, "Dismissal is required even if the union's complaint arguably raises issues of contract interpretation intertwined with the representation dispute." As we understand this argument, it encompasses two alternative legal theories. The first is that any case raising an "issue" of representation, no matter what form of relief it seeks, can be resolved only by the NMB. The second is that, if the NMB lacks jurisdiction to entertain a claim in which a representation issue is raised, then there is simply no remedy available because the RLA bars any other tribunal from deciding the representational issue.

Delta's first theory is premised, as an initial matter, upon AFA's complaint raising an issue of representation. According to Delta: (1) For AFA to prevail on its claim for damages, the arbitrator would have to find that the successorship clause conferred some right upon AFA, and that (2) had that right been honored, AFA would still be representing the Western flight attendants. Thus, (3) the arbitrator, in order to uphold AFA's claim, would have to resolve an issue of representation—which, as we have seen, Delta claims may be decided only by the NMB.

Assuming *arguendo* that AFA's claim, although not a jurisdictional dispute, raises an issue of representation, we do not find Delta's argument persuasive. First, Delta does not maintain that NMB, under § 2, *Ninth*, can award damages for breach of a CBA or otherwise; as the Supreme Court made clear in *Switchmen's Union*, the powers granted to the NMB under that section are quite narrow. 320 U.S. at 304. In effect, then, Delta urges upon us, or so it seems, the anomalous result that the NMB has exclusive jurisdiction over a claim as to which it has no power to grant a remedy.

Second, we question whether (at least in the absence of a clear statutory allocation of competence) any adjudicatory tribunal can have exclusive jurisdiction over an issue, as opposed to a type of claim or a remedy. Virtually any issue may arise in a variety of different contexts. As a general rule, whether a case is within the exclusive jurisdiction of an expert tribunal depends upon the nature not of the issues that may have to be decided, but of the substantive cause of action. *See Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 108 S. Ct. 830, 832-33 (1988) (notwithstanding NLRB's exclusive jurisdiction over labor law matters, "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies") (quoting *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975)); *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 662-66 (1961) (FPC's exclusive jurisdiction does not extend to state contract action seeking recovery of overcharges merely because the action calls for a determination of the validity of rates under the Natural Gas Act); *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1921) (notwithstanding ICC's exclusive jurisdiction to determine rates, "the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."). *Cf. Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) ("Section 711 [conferring on the federal courts exclusive jurisdiction over patent disputes] does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *'cases'* arising under those laws.") (emphases in original).

To illustrate, suppose that a newspaper published an article stating that AFA, as the certified representative

of Western's employees, had by racial discrimination violated its duty of fair representation, even though the publisher knew that in reality, AFA did not represent any Western employees. In the ensuing libel action, the issue would necessarily arise—since AFA would have to show that the published statements were false—whether AFA was or was not the employees' representative. Under Delta's first theory, the presence of the "representation issue" would mean that the NMB would have to hear the suit. In addition to being inconsistent with the limited role Congress envisioned for that tribunal, *Switchmen's Union*, 320 U.S. at 304, the result is obviously absurd. To the extent Delta suggests that every case that merely entails an issue of representation must be brought before the NMB, then, that argument plainly proves too much.

In support of its argument, Delta points to the Second Circuit's decision in *Air Line Pilots*, the only case we have found in which a court specifically noted a union's claim for damages, 656 F.2d at 17, yet required dismissal of the action on the authority of *Switchmen's Union*. The case is not on point, however, because the union there was seeking a *judicial* award of damages, not an order compelling *arbitral* resolution of its money claim. As we read *Air Line Pilots*, the court did not hold, as Delta suggests, that there is a "jurisdictional dispute" within the exclusive province of the NMB wherever an "issue" of representation appears; rather, the court merely held that to the extent a damage action for breach of a CBA may fall outside the jurisdiction of the NMB, the general principle of judicial noninterference in labor disputes bars the court from itself entertaining the claim.

We may assume that Congress could grant a tribunal exclusive authority to pass upon a particular issue of federal law (though Delta has pointed to no instance in which it has done so); still, we find no evidence that Congress intended to do that here. In support of its theory, Delta does cite to statements in several cases

where the courts, faced with that clearly were jurisdictional disputes within the scope of § 2, *Ninth*, described the scope of the NMB's exclusive jurisdiction somewhat expansively, that is, without distinguishing between "jurisdictional disputes" and "representation issues." *See, e.g., Texas Int'l Airlines*, 717 F.2d at 161, 162. We reiterate, however, that the relief sought in those cases was either the functional equivalent of certification by the NMB, *see id.* at 158 (union's complaint would require the court to "determin[e] who represents the hitherto covered employees after the merger"), or a judicial award of damages that appeared to be inconsistent with the background of "conciliation, mediation, and arbitration" emphasized by the Court in *M-K-T*, 320 U.S. at 332, *see Air Line Pilots Ass'n*, 656 F.2d at 17, and with the "narrow role of the courts in enforcing the RLA," *id* at 24. In the absence of some specific indication that the legislature intended that all issues arguably related to representation must be decided by the NMB, we cannot conclude that Congress vested in a body with such limited powers exclusive jurisdiction over a potentially broad range of disputes that may only tangentially raise issues within its competence.

We turn then to Delta's second theory, that even if the NMB cannot entertain a particular claim for relief in which a representation issue has arisen, the presence of that issue precludes any other authority from passing upon it, with the result that no remedy is available anywhere. Under this theory, the statutory provision for certification exclusively by the NMB has a preclusive effect, and any clause in a CBA, such as a successorship clause, the interpretation of which would require an arbitrator to make a finding on a representation issue, would simply be unenforceable and of no effect.

Due respect for privately bargained outcomes cautions against that result, unless some important public policy

would otherwise be compromised. Delta has pointed us only to the policies underlying Congress's delegation to the NMB of exclusive jurisdiction to determine who will represent employees in a post-merger setting. Although those policies do support the rule that a successorship clause cannot be specifically enforced, they simply do not require that an award of damages for breach of such a clause be barred. The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its CBA, it might forego entering into an otherwise desirable merger.

Delta has pointed us to nothing in the language, the legislative history, or even the spirt of the RLA to suggest that Congress, in vesting the NMB with exclusive jurisdiction over jurisdictional disputes, intended to remove barriers to economically efficient merger activity on the part of airline carriers. *Cf.* 49 U.S.C. § 11341(a) (exempting railroad mergers from, *inter alia*, the antitrust laws). In the absence of such an indication, we decline to hold, in the context of the threshold jurisdictional issue now before us, that a bargained-for successorship clause creates no legal rights or duties whatsoever. Whether the successorship clause in this case creates any legal obligations is, of course, a matter within the province of the arbitrator.

IV. Conclusion

This damage action is not a jurisdictional dispute within the NMB's exclusive jurisdiction under § 2, *Ninth*, of the RLA. At most, it may raise what Delta calls a "representation issue." In light of the Supreme Court's emphasis in *M-K-T* on the background availability of arbitration for disputes not within the purview of § 2, *Ninth*, however, we do not think it is non-arbitrable merely because that issue arises, because its resolution in arbitration would not interfere, as a practical matter,

with the NMB's certification function. We therefore conclude that § 2, *Ninth* of the RLA does not divest the district court of jurisdiction to order arbitration of AFA's claim for damages.

For all the foregoing reasons, the order of the district court dismissing the action is reversed, and the action is remanded for further proceedings.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987
CA 87-00040

No. 87-7040

Association of Flight Attendants, AFL-CIO,
Appellant

v.

Western Airlines, Inc.

BEFORE: Silberman, D.H. Ginsburg, and Sentelle, Circuit Judges

Upon consideration of Defendant/Appellee's Motion to Dismiss for Mootness and Appellant's opposition thereto, it is

ORDERED by the court that Defendant/Appellee's Motion to Dismiss for Mootness be denied. Although Appellant's claim based on any right of continued representation is moot, it is not clear whether an arbitrator could award damages for breach of the collective bargaining agreement. It is

FURTHER ORDERED that the parties limit their briefs to the issue of whether an arbitrator could award damages to Appellant if the arbitrator finds that Appellee breached the collective bargaining agreement.

United States Court of Appeals
For the District of Columbia Circuit
FILED JUN 06 1988
CONSTANCE L. DUPRÉ
CLERK

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 87-7040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Appellant,

v.

WESTERN AIRLINES, INC.

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

FILED MAR 31 1987

ORDER

Upon consideration of Appellant's Emergency Motion for Injunction To Compel Arbitration Pending Appeal and the Opposition and Response thereto and of Appellee's Emergency Motion For Expedited Appeal And Decision Before April 1, 1987, it is

ORDERED by the court that Appellant's motion to compel arbitration be denied. It is

FURTHER ORDERED by the court that Appellee's motion to expedite be denied.

APPENDIX D

[1] ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Plaintiff,

v.

WESTERN AIRLINES, INC.,

Defendant.

Civ. A. No. 87-0040.

United States District Court,
District of Columbia.

Feb. 20, 1987.

* * *

Deborah Greenfield, Stephen Crable, for plaintiff.

William J. Kilberg, Baruch A. Fellner, Washington, D.C., Scott A. Kruse, Los Angeles, Cal., for defendant.

MEMORANDUM

GESELL, District Judge.

This is a labor dispute which has arisen under the Railway Labor Act, 45 U.S.C. §151 to 188 (1982) ("RLA"). It comes before the Court on plaintiff union's ("AFA") verified complaint and dispositive cross-motions. Defendant Western Air Lines, Inc. is scheduled to merge with Delta Air Lines, Inc. on April 1, 1987. Western's employees are represented by several different unions according to craft, including AFA. Delta is a non-union carrier. AFA claims that Western has breached its 1984 collective bargaining agreement with AFA by failing to bind Delta to the terms of that agreement.

Facts

There are no material facts in dispute.

(1) On September 9, 1986, Western and Delta entered into an Agreement and Plan of Merger.

(2) On October 21, 1986, AFA filed a grievance over Western's failure to bind Delta to the 1984 collective bargaining agreement.

(3) On November 19, 1986, Western denied the grievance.

(4) On November 26, 1986, AFA submitted the dispute to Western's System Board of Adjustment pursuant to Section 24 of the collective bargaining agreement, and Western refused to arbitrate. Section 24(D), established under 45 U.S.C. § 184 of the RLA, provides for jurisdiction in the System Board over disputes "growing out of grievances or out of interpretation of application of any of the terms of the" collective bargaining agreement but "shall not extend to change in hours of employment, rates of compensation or working conditions. . . ."

(5) On December 11, 1986, the U.S. Department of Transportation gave final approval to the Agreement and Plan of Merger under the Federal Aviation Act.

(6) On December 18, 1986, as the first step looking toward merger, Delta acquired [2] 100% control of Western and became its parent.

(7) On January 8, 1987, AFA filed its complaint with this Court. Western's motion to transfer the case to the U.S. District Court for the Middle District of California[1] was denied on January 20, 1987, and the motions now before the Court were promptly filed and opposed.

(8) In Section 5.9 of the Agreement and Plan of Merger, Delta and Western agreed that Western would continue to honor its 1984 collective bargaining agreement with

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[1] Unions certified as representing Western employees engaged in other crafts are raising comparable issues there.

AFA while it was a separate company under Delta's control. This has been done and there is no claim to the contrary. No layoffs are contemplated, either before or after the merger. If Western merges as planned into Delta on April 1, 1987, all Western flight attendants presently represented by AFA will become employees of Delta, supplementing and combining with Delta's much larger complement of flight attendants. Significantly higher wages and benefits will be paid flight attendants now represented by AFA when they are Delta employees but, of course, they will be subject to Delta's own procedures, policies and rules governing flight attendants.[2]

(9) AFA's 1984 collective bargaining agreement with Western stated in Section 1(C):

This Agreement shall be binding on any successor or *merged Company* or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) *until changed in accordance with the provisions of the Railway Labor Act, as amended.* (Emphasis added.)

The Contentions of the Parties

If the merger occurs on April 1, 1987, AFA's certification as the bargaining representative for flight attendants formerly employed by Western who become Delta employees will automatically be extinguished pursuant to the National Mediation Board's established policy.[3]

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[2] In addition, Delta has voluntarily provided significant labor protective commitments to the Western flight attendants.

[3] Where two airlines are merged to form a single transportation system the National Mediation Board, to promote stable labor relations and remove problems of uneven representation, redundancy and confusion, considers the certification of all unions representing the employees of the acquired airline as extinguished on the date of integration. *See* Northwest Airlines, Inc., 13 N.M.B. 399, 400-01 (1986); Republic Airlines, Inc., 8 N.M.B. 49, 54-56 (1980). *See also Air Line Employees Assoc., Int'l v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 n. 4 (7th

Characterizing the controversy as simply a "minor" dispute involving the proper interpretation of Section 1(C)[4] and therefore appropriate for resolution by Western's System Board of Adjustment, AFA contends that Section 1(C) does not allow its collective bargaining agreement to be extinguished, but rather requires Western "to bind any successor or parent to that Agreement,"[5] by providing as a condition to merger that after the merger takes place Delta accept and be bound by the terms of AFA's 1984 collectively bargained agreement with Western.[6] AFA seeks an order from this Court directing Western to submit the issue to the System Board of Adjustment and asks the Court thereafter to retain jurisdiction to enforce compliance with any award the System Board makes against Western. If a prompt award is not made the Court is further requested to preserve the status quo by preventing the merger pending completion of proceedings before the System Board.

Western contends that the 1984 collective bargaining agreement is subject to change in accordance with requirements of the RLA as paragraph 1(C) states, noting that by operation of the RLA AFA's certifica- [3] tion as the bargaining representative of Western employees must dissolve with the merger. It also contends that a fundamental question of post-merger representation is presented, and that since issues of representation are current and directly involved the System Board lacks jurisdiction under the RLA and the issues fall under the exclusive jurisdiction of the National Mediation Board.

Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct 458, 93 L.Ed.2d 404 (1986); *International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir.1983).

[4] *See Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-25, 65 S.Ct. 1282, 1289-1290, 89 L.Ed. 1886 (1945).

[5] Complaint, ¶ 17.

[6] Complaint, ¶ 18.

Discussion

The situation presented by these conflicting positions is not one of first impression. Other federal courts have confronted similar labor disputes and their consistent recognition of the primary role of the National Mediation Board in resolving questions of representation has governed. Pursuant to the RLA, 45 U.S.C. §§ 155, 181 and 183, Congress has clearly relegated all cases involving the representation of airline employees for collective bargaining purposes to the exclusive jurisdiction of the National Mediation Board. *See General Committee of Adjustment v. Missouri-K.-T. Ry.*, 320 U.S. 323, 335-38, 64 S.Ct. 146, 151-53, 88 L.Ed. 76 (1943); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303-07, 64 S.Ct. 95, 98-100, 88 L.Ed. 61 (1943); *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 161-62 (5th Cir.1983); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 22-24 (2d Cir.1981). *See also* 9 T. Kheel, *Labor Law* § 50.07[2] (1986).

Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA.[7] This is particularly true in merger situations where representational issues inevitably arise and it is "impossible to look only to the existence of a collective

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[7] *See International Bhd. of Teamsters, supra*, 717 F.2d at 164 ("Given the [National] Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements").

bargaining agreement and to isolate it from the other operational and representational matters." *International Brotherhood of Teamsters, supra*, 717 F.2d at 163. Thus, in cases presenting union challenges to airline mergers, "[w]here a representation dispute appears on the face of the complaint . . . the court is bound to dismiss the action." *Air Line Pilots Association, International, supra* 656 F.2d at 24 (citing *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir.1963) (Friendly, J.), *cert. denied*, 376 U.S. 913, 84 S.Ct. 658, 11 L.Ed.2d 611 (1964)).

There can be no question that the issue of post-merger representation is presented by this dispute. AFA itself recognized in its memorandum in support of summary judgment that a System Board arbitrator might bind Delta to the 1984 agreement "if it wants to proceed with an operational merger," or might otherwise take action that would require Delta, a non-party to the 1984 agreement, to set Western's flight attendants apart from Delta's flight attendants regardless of operational requirements.[8]

For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA. *See, e.g., Air Line Employees Association, International v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir.1986) (per curiam), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458, 93 L.Ed.2d 404 (1986); *International Brotherhood of Teamsters, supra*, 717 F.2d at 160-61; *Air Line Pilots Asso-* [4] *ciation, International, supra*, 656 F.2d at 23-24.

Conclusion

AFA is entitled to no relief from this Court, and its motion for summary judgment is denied. Western is

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[8] Plaintiff's Memorandum at 25.

granted summary judgment and the complaint is dismissed with prejudice. An appropriate Order is filed herewith.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-7921 JMI (Px)

FILED
FEB 13 1987

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Plaintiffs,

v.

WESTERN AIR LINES, INC., *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, and the file in the case, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

2. Defendants' Motion to Dismiss for lack of jurisdiction is GRANTED without prejudice.

It is the duty of the National Mediation Board (hereinafter "NMB") to investigate all disputes regarding em-

ployee representatives. 29 C.F.R. § 1203.2. In the present case, the dispute is between the carrier (Western) and the union (the employee representative). The Supreme Court has held that the jurisdiction of the NMB over representation disputes under the Act is exclusive and the decisions of the NMB are representation matters and not subject to judicial review. *Switchman's Union v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 98-100 (1943); *General Committee v. Missouri-Kansas-Texas Railroad*, 320 U.S. 323 (1943). Federal Courts may not intervene in a representation dispute but must disclaim jurisdiction and leave to the NMB, the protection of the conditions necessary to insure employee free choice. *Texador v. Suressa*, 590 F.2d 357 (1st Cir. 1978); *Aircraft Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492 (N.D. Cal. 1976).

In the following cases, the Court dismissed the action since a representation issue was raised which was within the exclusive jurisdiction of the NMB. In *Airline Employees Associations v. Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3358 (November 18, 1986), the Court held that the union's action for expedited arbitration of a grievance and an injunction pending arbitration in a merger case raised representation issues. Similarly, in *Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983), the Court held that an action by a union seeking a declaration that its contract survived a merger raised an issue of representation.

Similarly, in the present case the union's action for an injunction and arbitration of a grievance in a merger, raises a representation issue. Therefore, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.

DATED: 13 FEB 87

JAMES M. IDEMAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-8032 JMI (Bx)

FILED
FEB 13 1987

AIR TRANSPORT EMPLOYEES,

Plaintiffs,

v.

WESTERN AIR LINES, INC.,

Defendants.

ORDER DISMISSING THE ACTION FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the file in the case, IT IS HEREBY ORDERED as follows:

1. The Court *sua sponte* dismisses the instant action for lack of subject matter jurisdiction, without prejudice. The Court finds that the present action raises a representation issue, which is within the exclusive jurisdiction of National Mediation Board (hereinafter "NMB").

2. On January 21, 1987, the Court issued an Order to Show Cause Re Dismissal, whereby the parties were instructed to respond to the Court's Order on or before January 28, 1987. However, the parties have failed to show cause as to why the action should not be dismissed. Accordingly, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.
DATED: 31 Feb 87

JAMES M. IDEMAN
United States District Judge

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,

Applicants,

v.

IBTCWHA, LOCAL UNION NO. 2702, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same is hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 1st
day of April, 1987

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,
Applicants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND AIR TRANSPORT EMPLOYEES

AMENDED ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction and order compelling arbitration before the Systems Boards issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same are hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 2nd
day of April, 1987.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.

ON APPLICATION FOR STAY

Decided April 2, 1987

[1302]

JUSTICE O'CONNOR, Circuit Justice.

Applicants request that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The underlying dispute in this case involves the division of responsibility for regulation of collective bargaining between airlines and their employees under the Railway Labor Act, 44 Stat. 577, 45 U.S.C. §151 *et seq.* The Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. §184. While courts lack authority to interpret the terms of a collective-bargaining agreement, a court may compel arbitration of a minor dispute before the authorized System Board.

"Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by §6 of the Act, 45 U.S.C. §§156, 181.

"Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under §2, Ninth of the Act, the National [1303] Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §152, 181.

Applicants, Western Airlines and Delta Air Lines, entered into an agreement and plan of merger on September 9, 1986. The merger agreement was approved by the United States Department of Transportation on December 11, 1986. On December 16, 1986, shareholder approval of the merger was conferred and Western Airlines became a wholly-owned subsidiary of Delta. On the morning of April 1, 1987, the merger of Western Airlines with Delta was scheduled to be completed. *See infra*, at 1308.

Respondents represented various crafts or classes of employees of Western Airlines. The Air Transport Employees (ATE) was designated by the National Mediation Board as the bargaining representative for a unit of Western employees consisting of clerical, office, fleet and passenger service employees. The International Brotherhood of Teamsters Local 2707 was the certified representative of three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. Each union's collective-bargaining agreement has a provision stating that the agreement shall be binding upon successors of the company.

Delta has substantially more employees than Western in the crafts or classes represented by the unions, and these Delta employees had no bargaining representative. Respondents filed grievances alleging that Western violated the successorship provisions of the two collective-bargaining agreements by failing to secure Delta's agreement to be bound by the collective-bargaining agreements between Western and respondent unions. Western refused to arbitrate the grievances, asserting that they necessarily

involved representation issues and therefore were within the exclusive jurisdiction of the National Mediation Board.

The unions filed separate complaints in the District Court for the Central District of California, each requesting the [1304] District Court to treat the successor clause dispute as a minor dispute, and compel arbitration of the dispute by the System Adjustment Board. Both complaints were dismissed for lack of subject matter jurisdiction.

On March 17, 1987, the Court of Appeals for the Ninth Circuit entered an interim order directing arbitration of the grievances to proceed before the unions' respective System Adjustment Boards pending appeal.

At approximately 8:00 p.m. Eastern Time, March 31—little more than 12 hours before the merger was scheduled to take place—the Court of Appeals for the Ninth Circuit issued the following order:

> "1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.
>
> "2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.
>
> "3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by the court, the injunction of the merger shall terminate.
>
> It is so ordered. A written opinion will be filed as soon as practicable." Application Exh. 4.

The timing and substance of the Court of Appeal's order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile. I conclude that this situation presents one of those rare extraordinary circumstances in which request for [1305] a stay before the Court of Appeals is not required under the Rule.

I also conclude that the judgment of the Court of Appeals, reversing the district court decisions, requiring the entry of orders compelling arbitration, and enjoining the merger, is final within the meaning of 28 U.S.C. §2101(f). The Court of Appeal's provision for lifting the injunction upon certain stipulations of applicants does not divest the judgment of finality when, as in this case, the required stipulations, to have any significance, must bind applicants to a concession of their position on the only question before the Court of Appeals: whether the successor clause dispute is within the jurisdiction of the System Adjustment Board or the National Mediation Board.

Moreover, regardless of the finality of the judgment below, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301 (1976) (REHNQUIST, J., in chambers).

The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective-

bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board. In *International Brotherhood of Teamsters* v. *Texas International Airlines, Inc.*, 717 F. 2d 157 (CA5 1983), the Court of Appeals for the Fifth Circuit held that "[t]he [Railway Labor] Act commits disputes involving a determination of who is to represent airline employ- [1306] ees in collective bargaining to the exclusive jurisdiction of the National Mediation Board." The Fifth Circuit stated, "A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. Moreover, a court may not grant injunctive relief maintaining the status quo if the underlying dispute is representational in nature, because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representation issue." *Id.*, at 161. "Given the Mediation Board's undeniable sole jurisdiction over representation matters," and the practical problems of divided jurisdiction among the other dispute-resolution fora, the Fifth Circuit inferred "a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.*, at 164. The Court of Appeals for the Seventh Circuit treated the question of National Mediation Board jurisdiction over alleged collective bargaining violations implicating post-merger representation as one settled by "the overwhelming and well-developed case law," and found "no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits." *Air Line Employees* v. *Republic Airlines, Inc.*, 798 F.2d 967, 968 (quoting Order No. 86C5239 (N.D. Ill. July 28, 1986)), cert. denied, 479 U.S. 962 (1986). See also *Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines*, 656 F. 2d 16 (CA2 1981); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F. 2d 975, 977 (CA1), cert. denied, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks* v. *United Air*

Lines, Inc., 325 F. 2d 576 (CA6 1963), cert. dismissed, 379 U.S. 26 (1964). It was upon this overwhelming body of case law that the District Court for the District of Columbia relied when it considered the complaint of the Association of Flight Attendants (AFA), also arising from the Western-Delta merger. AFA's complaint, seeking an order compelling Western to submit to arbitration by the System Board of Adjustment and enjoining [1307] the merger pending completion of proceedings before the System Board, was dismissed. *Association of Flight Attendants, AFL-CIO* v. *Western Airlines, Inc.*, No. 87-0040 (D DC February 20, 1987). On March 31, 1987 the Court of Appeals for the District of Columbia Circuit denied AFA's motions to compel arbitration pending appeal, and its motion for expedited appeal and decision before April 1. *Association of Flight Attendants, AFL-CIO* v. *Western Airlines, Inc.*, No. 87-7040. The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

To appreciate the balance of the equities created by the Ninth Circuit's order, one must focus on the stipulation clause of that order. What was to be gained or lost by the applicants and respondents in this case was not the merger of Western and Delta Airlines alone but the substance of the stipulation on which that merger was conditioned by the Ninth Circuit.

The stipulation which the Ninth Circuit required from Western and Delta Airlines is subject to two interpretations. The first is a requirement that Delta and Western agree that if, after full judicial review of the *jurisdictional* as well as other issues raised, it is determined that the claims presented by the respondents fall under the jurisdiction of the System Adjustment Board, the successor corporation will be bound by the result of the completed arbitration process. Under this interpretation of the stip-

ulation, the successor corporation was required to do no more than adhere to the obligations placed upon it by law, as those obligations are determined in the litigation. Those legal obligations, of course, would exist independent of any stipulation. If the stipulation would leave the applicants free to assert any of their arguments against the jurisdiction of the System Adjustment Boards, the applicants would have remained in the [1308] same position after the stipulation as they were before, and the stipulation would have served no purpose.

The other interpretation of the clause is that, in order to avoid an eleventh hour injunction of the merger, Delta and Western were required to stipulate as to the correctness of respondents' argument that this dispute *did* in fact fall under the jurisdiction of the Systems Adjustment Board. As to the balance of equities on this interpretation of the Ninth Circuit's order, they clearly weigh in favor of the applicants. The potential harm that would be suffered by applicants as a result of the Court of Appeals' injunction of their merger is seriously aggravated by the fact that the order issued on the very eve of the merger's consummation. For several months, applicants have been planning to combine their large-scale, complex, inter-related and heavily regulated operations effective April 1, 1987. That planning included the transfer, modification and cancellation of hundreds of Western's contracts for supplies and services and equipment leases. The approval of the Federal Aviation Administration of changes in Western's operating certificates, specifications and training programs have been sought and received. Maintenance schedules, flight schedules and staffing schedules have been modified in order to effect a smooth transition to a merged operation on April 1. Large numbers of Western management personnel, without whom it cannot operate as an independent entity, are to be severed effective April 1; many have presumably arranged for new employment. Delta has negotiated for transfer of Western's Mexican

and Canadian routes with the respective governments of those countries. It is doubtful that these arrangements can be undone if the merger does not take place as anticipated.

Because of the operational adjustments that are already in place, the FAA has expressed doubt whether Western will be permitted to continue operations should the merger not take place, potentially stranding thousands of travelers. [1309] Employees, expecting to be transferred to new locations after April 1, have sold old homes and bought or leased new ones. Changes in pay, working conditions, and conditions of employment all have been planned for and relied upon in anticipation of the merger. Millions of dollars of advertising have been targeted toward the April 1, 1987 merger date. And the list of consequences goes on. See Emergency Application for Stay and Vacation of Injunction, Affidavit of Hollis Harris and Exhibit 1 thereof; Affidavit of Robert Oppenlander; Affidavit of Russell H. Heil; Affidavit of Whitley Hawkins; Affidavit of C. Julian May; Affidavit of Jason R. Archambeau. The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality. Under the second interpretation of the stipulation clause—the only interpretation under which the required stipulations would have had meaning—applicants could prevent these losses only by conceding their argument, supported by the great weight of authority, that their dispute with respondents fell under the jurisdiction of the National Mediation Board. On the other side, respondents had no entitlement to such a concession, obtained under these circumstances, from parties that had otherwise indicated their intent to continue to assert the contrary position on the jurisdictional issue. Before the Court of Appeals the unions argued that completion of the merger would moot their claims under

the collective-bargaining agreement to System Board arbitration. For the reasons stated above, I doubt that respondents' claims would ultimately prevail. Moreover, preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, rather than by the inequitable last-minute foisting of a Hobson's choice on applicants. Finally, the employees themselves are protected by Delta's assumption of the Allegheny-Mohawk Labor Protec- [1310] tive Provisions, requiring the continuation of certain fringe benefits, displacement and dismissal allowances for up to four to five years for employees who lose their jobs or get lesser-paying jobs, moving and related costs for employees required to move, integration of seniority lists and binding arbitration of any dispute relating to the labor protective provisions. See *Allegheny-Mohawk Merger Case*, 59 C. A. B. 22 (1972); Heil Affidavit, ¶6.

Because the stipulation upon which the lifting of the injunction was conditioned appears to be either unnecessary or extremely inequitable, depending upon its interpretation, and because it appears to me likely that at least four Justices would vote to grant certiorari and that the applicants are likely to prevail on the merits, I grant the requested stay of the Court of Appeals for the Ninth Circuit's injunction and order compelling arbitration before the System Boards, pending the timely filing and subsequent disposition of a writ of certiorari in this case.

APPENDIX I

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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14 NMB No. 86
FILE NO. C-5955

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[291] In the matter of
the merger of

DELTA AIR LINES, INC.

and

WESTERN AIR LINES, INC.

TERMINATION OF
CERTIFICATIONS
(WESTERN AIR LINES)

July 9, 1987

On April 20, 1987, the National Mediation Board (Board) received a request from Delta Air Lines, Inc. (Delta) invoking the Board's services "to determine whether the Board's certifications of the Western labor organizations as collective bargaining representatives of the various crafts or classes at Western have been extinguished or terminated effective April 1, 1987." Delta's request was made in accordance with *Trans World Airlines/Ozark Air Lines*, 14 NMB 218 (1987).

Review of the Board's records reveals that several labor organizations were certified to represent various crafts or classes at Western Air Lines, Inc. (Western). In R-4995,

the Air Transport Employees was certified to represent the craft or class of Office, Clerical, Fleet & Passenger Service Employees. The Association of Flight Attendants was certified to represent the craft or class of Flight Attendants in R-3665. The International Brotherhood of Teamsters was certified to represent the crafts or classes of Instructors (R-4785), Mechanics and Related Employees (R-3951) and Stock Clerks (R-3788). The Air Line Pilots Association represents the craft or class of Pilots pursuant to voluntary recognition.

On Delta the Pilots are represented by ALPA.The craft or class of Dispatchers is represented by the Professional Airline Flight Control Association pursuant to certification in R-4254.

[292] The Board, on April 23, 1987, directed Delta and Western to furnish certain information on the present operations of the airlines. Delta and the involved labor organizations submitted responses. Pursuant to the Board's request Delta submitted additional information on May 21, 1987, as well as June 16 and 22, 1987.

ISSUES

The following issues are before the Board:

1) Whether Delta and Western combined to form a single transportation system, for purposes of the Railway Labor Act, on April 1, 1987 and;

2) If a single transportation system was created, what affect if any does this have on the representation certifications of the organizations at Western and when did the affect occur?

PENDING LITIGATION

An issue arose from grievance actions filed by ATE, IBT and AFA prior to April 1, 1987. In those actions the

unions sought to compel arbitration of grievances under their labor agreements with Western, alleging breach of successorship clauses in connection with the then-proposed merger of Western into Delta. The unions alleged that Western violated those clauses by failing to secure Delta's agreement to be bound by the unions' contracts after the merger was completed. Western refused to submit to arbitration contending that it might result in a decision on representation of Delta employees after the merger. Representation matters, Delta asserted, are within the exclusive jurisdiction of the Board.

The unions filed actions in the district court for injunctions to compel arbitration. ATE and the IBT filed such action in the United Stated District Court for the Central District of California while AFA sought relief in the United States District Court for the District of Columbia. In all instances, the district courts denied the unions the relief requested. However, on appeal, the United States Court of Appeals for the Ninth Circuit, on March 31, 1987, [293] ordered the IBT and Western to "select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreement." The merger was also enjoined. *IBT* v. *Western Air Lines, Inc.*, Civil No. 87-5657 (9th Cir., March 17, 1987). A similar ruling regarding Western and ATE was made in *ATE* v. *Western Air Lines, Inc.*, Civil No. 87-5667 (9th Cir. March 17, 1987). AFA unsuccessfully appealed the decision of the District Court to the Circuit for the District of Columbia.

On April 1, 1987, the Honorable Sandra Day O'Connor, the Circuit Justice for the Ninth Circuit, stayed the orders of the Ninth Circuit pending the filing and disposition of a petition for certiorari to review the judgment of the Ninth Circuit. A Petition for Writ of Certiorari was filed by Delta on May 20, 1987.

CONTENTIONS

Delta

Delta contends that Western merged with it on April 1, 1987, and ceased to exist on that date. Therefore, Delta concludes that the certifications of the Western labor organizations were extinguished or terminated as of April 1, 1987.

Air Line Pilots Association (ALPA)

ALPA which represented pilots on both airlines has not taken a position on this matter.

Air Transport Employees (ATE)

ATE contends that before the Board can resolve the question of a merger, the agency must first decide whether it "has exclusive jurisdiction to resolve disputes over the obligations of carriers under a successorship clause." The organization requests that the Board "proceed to order an arbitration to resolve the interpretation of the successorship clause in the ATE-Western agreement." If the Board decides that it does not have the jurisdiction, ATE argues that the Board should state so in a very definitive manner and also state that the application of the successorship [294] clause in the ATE-Western agreement would not impinge on representation matters which are within the exclusive jurisdiction of the Board. ATE asserts that the Board should state that its certification is "in effect" until the successorship question has been resolved through arbitration or an election has been held. Citing *Continental Airlines*, 10 NMB 25 (1982) for the proposition that the Board has permitted the recognition of two contracts and two labor organizations in a single craft or class pending an election, ATE argues that such action would not circumvent any provision of the Act.

International Brotherhood of Teamsters (IBT)

It is the IBT's position that its certifications cannot be terminated because there are outstanding contractual issues which are outcome determinative and the Board should not terminate certifications without an election. The IBT's position is based on two arguments. First, the IBT argues that due process considerations and relevant Board criteria "counsel" against termination of the union's certifications. In support of this argument, the IBT makes the following points:

1. Factual developments after April 1 would be radically different if the adjustment board [system board] proceeding had not been interrupted and the Union had prevailed.

2. Carriers must be made to understand that an operational integration conducted in violation of outstanding contractual obligations will not furnish grounds for termination of existing certifications.

3. It would violate the Union's due process rights for the Board to give conclusive effect to the Carriers' actions that occurred only because of a legal proceeding in which the Union was not allowed to participate.

[295]

4. It is wrong to allow actions undertaken under a temporary order to have "decisional significance." On this point, the IBT contends that the Carrier's object in this proceeding is to obtain a determination from the Board that the Union's certifications terminated, effective April 1, 1987, so they can conclude that Western's agreements are extinguished. This will enable them to claim that the Teamsters' legal case has been rendered moot by intervening

events, i.e., the Board's decision. Thus, the Ninth Circuit Court of Appeals' judgment and order must be vacated and the case dismissed.

5. Because of the pending litigation, the Board's relevant criteria as developed in *TWA/Ozark* cannot be fairly or accurately applied at the present time.

Second, the IBT argues that the Board should not terminate certifications, thereby allowing represented employees to become unrepresented, without first investigating the employees' representation desires. In this case, termination of certificates is inconsistent with the scheme of the Act because it presumes that a majority of employees in the post-merger craft or class reject representation based solely on the fact that a majority of craft or class employees on the acquiring carrier as it existed prior to the merger, have not selected a representative. Because of the unique circumstances of this case, termination of the certification effectively would constitute decertification.

Association of Flight Attendants (AFA)

AFA believes that the Board should rule that "AFA's certificate should be maintained pending final resolution of AFA's successorship claim." The unresolved question of the survivability of the col- [296] lective bargaining agreement is crucial to any Board determination, it argues.

FINDINGS OF FACT

I.

Delta reports that Western's Federal Aviation Administration (FAA) certificate was surrendered on April 1, and, effective that same day, Delta's certificate was amended to include the former Western operations. Western, according to Delta, ceased to exist as a separate corporate entity when a certificate of Ownership and Merger

was filed with the Secretary of State of Delaware on April 1, 1987.

Delta states that Western is not holding itself out to the public as a single entity. Delta and Western are operating under a single Delta schedule. All Western identification and logo have been removed from Western aircraft and replaced with Delta's name and logo. Complete repainting of the aircraft will be accomplished by the fourth quarter of 1988. Identification changes were made on all ground equipment and Delta alleges that repainting of such equipment was accomplished by July 1, 1987.

Former Western employees now wear Delta uniforms or identification name tags. The labor relations for Western personnel is handled by Delta's Senior Vice President-Personnel. Western's Vice President-Labor Relations was made Delta's Assistant Vice President-Personnel.

There were no Western advertisements after March 15, 1987. Western's reservation system was merged into Delta's on April 1. No tickets have been issued on Western stock since April 1; all Western ticket stock has been destroyed. Former Western airport signs, city ticket office signs, identification materials in aircraft seat pockets, signs on maintenance and reservations facilities were changed from Western to Delta on or before April 1 or within a few days thereafter. Several Western officers have become officers of Delta and two Western directors have become directors of Delta.

II.

[297] Investigation has revealed the following findings concerning the former Western employees. Delta voluntarily provided Western employees with Labor Protection Provisions (LPPS) "no less favorable" than the *Allegheny-Mohawk* Labor Protective Provisions. Titles for all positions at Western have been changed to coincide with the Delta titles so that the positions held by former Western

personnel now are identified by the exact same titles as positions held by all other Delta personnel.

Pilots

Delta's pilots and the former Western pilots have merged seniority lists.

Mechanics and Related Employees

Under Delta's policies with respect to these employees, a seniority list is used only in the event of furloughs or transfers to other stations. For all purposes involving seniority, the employee's date of hire is used.

At Delta's request, the former Western employees and original Delta employees elected committees to negotiate the integration of the seniority lists. On June 17, 1987, the committees reached an agreement on a method for compiling an integrated seniority list. According to Delta, the actual integrated list based upon this agreement "will be compiled in the near future."

Office, Clerical, Fleet & Passenger Service Employees

All ground employees have been integrated and are working under Delta's policies, work rules and operating procedures. Western's general office and flight control functions have been transferred to Atlanta, Georgia, where "the former Western personnel have been consolidated with the original Delta personnel." To the extent that seniority is applicable to agents and clerical personnel, Delta states that such integration "was automatically accomplished" because date of hire is used for all matters governed by seniority.
[298]

Flight Attendants

Delta is presently training the former Western flight attendants for assignments on the Delta aircraft. Such training is required by Federal Aviation Administration

Regulations. The training is conducted base-by-base and commenced on May 4, 1987.

At the present time, the seniority lists of the former Western flight attendants and original Delta flight attendants have not been merged. The former Western and original Delta flight attendants elected committees in an attempt to informally negotiate an integration. Pursuant to the LPPs, the former Western flight attendants requested that the Board furnish a panel of arbitrators for selection of a netural to resolve all outstanding issues. A panel has been furnished. According to Section 13 of the LPP, a final and binding decision shall be rendered within 90 days after the controversy arises.

Instructors

Former Western instructors have been merged at Delta on the basis of date of hire. Some instructors have transferred to Atlanta and others remained in Los Angeles where simulators are located. All of the instructors presently operate under Delta's rules and operating procedures.

Stock Clerks

The stock clerks were reclassified as supply attendants on April 1, 1987. They have been merged with Delta supply attendants on the basis of date of hire. They work under Delta's rules.

Dispatchers

Seniority integration for dispatchers has been agreed to and incorporated into a new contract with the Professional Airline Flight Control Association covering both original Delta and former Western dispatchers.

III.

[299] In reference to the Board's inquiry concerning the status of any grievances filed, Delta states that, on April

1, 1987, it "discontinued" the processing of any grievances with the former Western unions except ALPA. Such actions were based on Delta's interpretation of the *TWA/ Ozark* case. Subject to assurances by the Board that such actions would not result in a finding of recognition of the involved unions, Delta states that it will resume processing "so that no employee will be deprived of any rights to which he or she is legally entitled." Delta proposes to process these grievances in such a way that there will be no recognition of the union for collective bargaining purposes.

Delta will continue system board cases with the same system board procedures in place prior to the merger on the condition that the grievant and the union agree that Delta's actions will not result in any contention that Delta has recognized the union for collective bargaining purposes. The Carrier wants a "specific indication" from the Board that its action will not affect the Board's determination. Delta has notified everyone that it will not take any further action until the Board has ruled on this matter.

Discussion

I.

Pending Litigation

AFA and the IBT request that the Board delay a decision on the matter pending final resolution of the litigation. The Board finds that such a delay in this case would not enhance the Act's purpose of promoting labor stability. Sufficient facts have been presented to warrant determination of the specific issues before this Board.

ATE and AFA have asserted that the Board should state that the certifications are "in effect" pending resolution of the matter in litigation. For reasons stated below on the question of single transportation system, this request is denied.
[300]

II.

Single Transportation System

This is a situation where a merger or acquistion is alleged to have occurred and the surviving carrier is contending that a single transportation system exists. The Board in *Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987), enunciated several factors helpful in determining whether two carriers' operations have been integrated into a single transportation system:

> [T]he Board looks into such practical considerations as whether a combined schedule is published; how the carrier advertises its services; whether reservation systems are combined; whether tickets are issued on one carrier's stock; if signs, logos and other publicly visible indicia have been changed to indicate only one carrier's existence; whether the process of repainting planes and other equipment, to eliminate indications of separate existence, has been progressed.
>
> Other factors investigated by the Board seek to determine if the carriers have combined their operations from a managerial and labor relations perspective. Here the Board investigates whether labor relations and personnel functions are handled by one carrier; whether there are a common management, common corporate officers and interlocking Boards of Directors; whether there is a combined workforce; and [301] whether separate identities are maintained for corporate and other purposes.[1]

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[1] The Board notes that while these factors are applicable in this instance, they may not be controlling in a particular case arising in the future. In fulfilling its responsibilities under Section 2, Ninth, the Board may "pierce the corporate veil for purposes of rational labor-

Applying the above factors to the present factual situation, the Board finds that Western's operations have been merged into Delta. As a result of this merger and the foregoing findings, the Board holds that Western's certificates of representation terminated on April 1, 1987. This holding is based on the present facts as revealed during this investigation including Delta's plans to merge the seniority lists for the flight attendants and the mechanics and related employees thereby effectively and completely merging its operations. The labor organizations and Delta are requested to report to this Board any significant departure from Delta's plans to resolve this matter or any significant change in the facts as presented to this Board. Delta is requested to inform the Board within 90 days of the date of this decision of its progress in completely merging the seniority lists for the flight attendants and the mechanics and related employees.

III.

Delta's Position on Processing Grievances

Delta has stated that it has suspended processing of grievances pending "specific indication" from the Board that the Carrier's actions will not affect the Board's determination. The Board is not in the position to provide such "specific indication". The grievance process arises out of contractual rights and, as such, is outside the jurisdiction of this Board. Accordingly, Delta's request for such "specific indication" is denied. The Board hastens to [302] add that this decision cannot be interpreted as inhibiting the processing of grievances.[2]

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management relations". *See Republic Airlines, Inc. and Hughes Air Corp.*, 8 NMB 49 (1980), and *Offshore Logistics, Aviation Services Division d/b/a/ Air Logistics*, 11 NMB 144 (1984).

[2] The Board finds disturbing any actions by the parties in a merger situation that result in withholding vested contractual rights. In this instance, the Board sees no reason why appropriate disclaimers should not effectively protect the rights involved and the processing of grievances should not be delayed further.

CONCLUSION

Based on the foregoing and a review of the record before it, the Board finds that Western's certificates of representation terminated on April 1, 1987. ATE, AFA and the IBT will each have 60 days from the date of this decision to file a representation application on the combined system supported by a minimum 35% showing of interest. Such showing of interest may be supported in part by the dues-checkoff authorizations previously in effect at Western. Delta is requested to inform the Board within 90 days of the date of this decision of its progress in completely merging the seniority lists for the flight attendants and the mechanics and related employees.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Charles R. Barnes
Charles R. Barnes
Executive Director

APPENDIX J

* * *

86-1855 DELTA AIR LINES, INC., ET AL V. INTL. BHD. OF TEAMSTERS, ETC

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit to consider the question of mootness. Justice Stevens took no part in the consideration or decision of this case.

* * *

APPENDIX K

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5657; 87-5667
D.C. Nos. CV-86-7921-JMI; CV-86-8032
(Central California)
ORDER

IBTCHWA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., ET AL.,
Defendants-Appellees.

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC.,
Defendant-Appellee.

On Remand from the United States District Court

Filed August 18, 1988

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Cecil F. Poole, Circuit Judges.

COUNSEL

Robert Vogel and Roland Wilder, Jr., Los Angeles, California; Robert A. Bush, Los Angeles, California, for the plaintiffs-appellants.

Scott Kruse, Los Angeles, California, for the defendants-appellees.

ORDER

This matter is before us after the United States Supreme Court vacated our decision in *IBTCHWA, Local Union No. 2707 v. Western Air Lines, Inc.*, 813 F.2d 1359 (9th Cir. 1987), and remanded for consideration of mootness. *Delta Air Lines, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Airline Division*, 108 S. Ct. 53 (1987). The unions originally filed this action to compel Western Air Lines to submit to arbitration of the unions' claim that Western's agreement to merge with Delta Air Lines violated collective bargaining agreements between Western and the unions. The relief sought was an order compelling Western to arbitrate and an injunction prohibiting the merger.

The district court denied the relief, and in an expedited appeal we ordered arbitration and conditionally stayed the merger. Upon the airline's ex parte application to Justice O'Connor, our stay was lifted and the merger took place. Accordingly, none of the relief sought in the original complaint is now available. *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.3, p. 261 (1984) ("[t]he central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief"). We express no opinion as to the viability of any claims that may be asserted in the post-merger context. None are present in this case.

Accordingly, the appeal is dismissed as moot, and the district court should vacate its decision. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988
CA 87-00040

No. 87-7040

Association of Flight Attendants, AFL-CIO,
Appellant

v.

Western Airlines, Inc.

BEFORE: Mikva, Buckley and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of appellee for stay of mandate it is

ORDERED, by the Court, that the motion is granted and the issuance of the mandate of the Court is stayed through September 18, 1989.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 05 1989

CONSTANCE L. DUPRÉ
CLERK

APPENDIX M

[1] UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER 87 CIV. 6694 (PKL)

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO

Plaintiff,

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN CORPORATION,

Defendant.

APPEARANCES

O'Donnell & Schwartz
60 East 42 Street
New York, N.Y. 10165
David B. Rosen, Esq., *of counsel*

Attorneys for Plaintiffs

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Richard Schoolman, Esq., *of counsel*

Attorneys for Defendants

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[2] LEISURE, *District Judge*,

Plaintiff, Flight Engineers' International Association ("FEIA" or the "union"), moves for summary judgment against defendants, Pan American World Airways, Inc. ("PAWA") and Pan American Corporation ("Pan Am Corp."). The complaint charges that the defendants have violated the Railway Labor Act, 45 U.S.C. § 151, *et seq*, and FEIA's collective bargaining agreement by refusing to arbitrate what FEIA describes as a contract dispute. Defendants have cross-moved to dismiss FEIA's complaint for lack of subject matter jurisdiction.

As indicated below, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted. Therefore, the Court does not reach the plaintiff's motion for summary judgment.

In evaluating a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court may consider evidentiary matters presented by affidavit or otherwise, and is not restricted to the face of the pleadings. *Kamen v. American Tel. & Tel. Co.*, 792 F.2d 1006, 1011 (2d Cir. 1986). *See also Exchange Nat. Bank of Chicago V. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976). Consideration of extraneous materials does not convert a motion under Fed. R. Civ. P. 12(b)(1) into a Fed. R. Civ. P. 56 motion. *Kamen, supra*, 791 F.2d at 1011.

A motion to dismiss under Rule 12 must be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [3] *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Rauch v. RCA Corp.*, 861 F.2d 29 (2d Cir. 1988); *Morales v. New York State Department of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988). The Court must accept the pleader's allegations of fact as true, liberally construe those allegations, and make such reasonable inferences as may be

drawn in its favor. *Dahlberg v. Becker*, 748 F.2d 85, 88 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Murray v. City of Milford, Connecticut*, 380 F.2d 468, 470 (2d Cir. 1967). *See also Scheuer, supra* at 236; *Pross v. Katz*, 784 F.2d 455, 457 (2d Cir. 1986). On a motion to dismiss, the Court must "determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded." *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 558 (2d Cir. 1985). The following statement of the relevant facts is based both on the pleadings and the affidavits submitted in connection with the motions, but the determinative question, for present purposes, raises a pure issue of law.

Background

PAWA is an international airline, and a wholly-owned subsidiary of defendant Pan American Corp. FEIA is the exclusive collective bargaining representative of PAWA's Operations Training Instructors ("OTI's"). FEIA obtained its representative status through a certification issued by the National Mediation Board in 1968. *See* Article 1(A) of the Collective Bargaining Agreement (the [4] "Agreement"), attached as Exhibit A to First Amended Complaint (the "Complaint").

Article 1(B) of the Agreement contains what is often called a "scope" clause; this agreement's scope clause requires PAWA to utilize FEIA-represented OTI's employed by PAWA whenever PAWA performs training of, *inter alia*, pilots, flight attendants, and ground personnel. The Agreement specifically provides that "OTI's by component group, shall exclusively perform the instructional work which is conducted by the Company requiring the services of an Instructor."

In addition to the original Agreement, a letter dated February 19, 1986 was signed by FEIA, PAWA, and Pan Am Corp. and was subsequently appended to the Agreement as Appendix U. That letter stated in relevant part:

> Pan Am Corporation, parent of Pan American World Airways, Inc., agrees that it or any successor to it will be bound by Article I of the Pan American World Airways, Inc.—FEIA collective bargaining agreement covering Operations Training Instructors in the same manner as if references to Pan American World Airways, Inc., in Article I read Pan American Corporation.

In April 1986, after the Agreement was supplemented by the above noted letter, Pan Am Corp. purchased Ransome AirLines, Inc. ("Ransome"), a regional airline. Prior to the acquisition, Ransome had been an independent carrier, unaffiliated with either of the defendants. Subsequent to the acquisition, Ransome became, like PAWA, a wholly-owned subsidiary of Pan American Corp. In October 1986, Ransome's name was changed to Pan American Express, Inc. ("Pan Am Express.")

[5] After being acquired by Pan Am Corp., Ransome continued to utilize its *own* employees, not PAWA-employed/FEIA-represented OTI's, to conduct training for its own pilots, flight attendants, and ground personnel. Of the approximately 16 Ransome employees training other Ransome employees, some are represented by the Independent Union of Flight Attendants, some by the Air Line Pilots Association, and some are un-represented. *See* Affidavit of David C. Reeve, sworn to on December 6, 1988, ¶ 2-3.

The FEIA took the position that PAWA and Pan Am Corp. violated Article I(B) of its agreement by failing to utilize FEIA represented OTI's to train Ransome personnel. FEIA consequently filed its initial grievance and sought to refer the grievance to a five man Board of Adjustment, as provided by Article 23 of the Agreement. As a remedy, FEIA sought the assignment of work to FEIA-represented OTI's, as well as damages. PAWA responded by denying FEIA's grievance, and declined to submit to arbitration by the Board of Adjustment. PAWA

stated that it would submit to arbitration by the Board of Adjustment only if compelled to do so by court order. *See* Complaint ¶ 13-15. FEIA, in turn, filed this action.

Following the decision of a similar case, *IUFA v. Pan American World Airways, Inc.*, 664 F. Supp. 156 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988), decided in PAWA's favor, FEIA amended its grievance. The amended grievance eliminated any claim to the work, and sought only the money its PAWA-employed OTI's would have earned if allowed to train Ransome personnel. PAWA stood by its belief [6] that the grievance was not arbitrable, and reiterated its position that it would not arbitrate before the Board of Adjustment, absent a court order to do so. Subsequently, FEIA filed the First Amended Complaint in this Court, seeking only damages.

Underlying PAWA's refusal to arbitrate the dispute is PAWA's position that the Board of Adjustment lacks jurisdiction to decide the grievance. PAWA claims that representational issues, namely, whether two related airlines will be treated as a single carrier for representation purposes, and what should be the effect of one carrier's collective bargaining agreement with a union when that carrier acquires or becomes affiliated with a second carrier, are implicated. When representation issues are involved, the exclusive statutory decision-making authority of the National Mediation Board is invoked. The issue now before the Court is whether the exclusive jurisdiction of the National Mediation Board over "representational disputes," pursuant to §2 Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. §2 Ninth, precludes resolution of the dispute by a Board of Adjustment acting pursuant to §204 of the RLA, 45 U.S.C. §1984 and Article 23 of the parties' collective bargaining agreement.

Discussion

This action involves the threshold jurisdictional question of which forum will initially entertain the dispute. FEIA

claims that the present conflict with the defendants is a "minor" dispute, and under the statutory resolution scheme of the RLA, the Court should [7] therefore compel PAWA to submit to arbitration before the Board of Adjustment. PAWA, while agreeing that the dispute is minor, argues that the dispute is also representational. As such, it would have to be resolved by the National Mediation Board, and the Court would consequently lack subject matter jurisdiction.

A brief review of the tripartite dispute resolution scheme established by Congress in the RLA is necessary for the resolution of the jurisdictional question presented by this case. The RLA regulates labor relations on the nation's railroads and airlines. The statute defines three types of labor disputes, and establishes a distinct resolution procedure for each type of dispute.

"Minor" disputes concern the application or interpretation of an existing collective bargaining agreement. *See* 45 U.S.C. § 184. These disputes are "committed to a grievance-arbitration process" before an authorized system board of adjustment. *See, e.g., IUFA v. Pan American World Airways, Inc.*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988). "Major" disputes involve the formation of collective bargaining agreements, and the resolution of such disputes proceeds according to conference and mediation procedures, pursuant to section 6 of the Act. *See* 45 U.S.C. §§ 156, 181. Neither party contends that the present dispute is "major."

Finally, "representation" disputes involve the definition of a bargaining unit, and the determination of employee collective bargaining representatives. "Representation" disputes include whether two related carriers will be treated as one for [8] representation purposes, and whether a craft or class must be system-wide or may be split for representation purposes. *See, IUFA, supra*, 664 F. Supp. at 158. Under Section 2, Ninth of the Railway Labor Act,

45 U.S.C. § 152 Ninth, the National Mediation Board has exclusive jurisdiction over all representation disputes.

In deciding whether a particular labor dispute is minor, major or representational, a court is guided by certain widely accepted principles. Justice O'Connor, sitting as a Circuit Justice, observed that:

> [t]he great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.

Western Airlines v. Intern. Broth. of Teamsters, 480 U.S. 1301, 1305 (O'Connor, Circuit Justice 1987).

It is also generally recognized that what may be characterized as a "minor" dispute over the interpretation of a contract may also implicate concerns which are representational in nature. The proper course for a court to follow in such circumstances is to allow the National Mediation Board "alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Int. Bro. of Teamst. Etc. (Air. Div.) v. Tex. Int. Air.*, 717 F.2d 157, 164 (5th Cir. 1983). *See also Western Airlines*, *supra*, 480 U.S. at 1305. Moreover, even though a representational dispute may be murky, its presence, together with the traditionally narrow role of the courts in enforcing the RLA, requires the conclusion that the Court lacks subject matter [9] jurisdiction over the action. *Air Line Pilots Ass'n v. Texas Intern. Airlines*, 656 F.2d 16, 24 (2d Cir. 1981).

Both parties recognize that many of these same issues, involving these same entities, were resolved by the Court in *IUFA*, *supra*, 664 F. Supp. 156. This action largely turns on the degree that the factual and legal principles here are the same, or distinguishable, from that case. In

IUFA, a flight attendant's union brought an action against a subsidiary airline (PAWA) and its parent company (Pan Am Corp.), alleging that they violated the Railway Labor Act and a collective bargaining agreement by refusing to arbitrate a contract dispute. The District Court, Sand, J., granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The Court held that the union's claim that flight attendants on the union's seniority list had the right to perform work on flights of another subsidiary airline, which was then being performed by unrepresented employees, involved a representation dispute and, consequently, the exclusive jurisdiction of the National Mediation Board. The Second Circuit subsequently affirmed the District Court's decision.

Demand for Work Versus Claim for Damages

Plaintiff's attempts to distinguish *IUFA* and the present case ultimately turn upon the notion that seeking contractual damages calls for a different result than seeking the right to perform the work; that representational issues are not implicated in the [10] former action, while they may be in the latter.[1] The Court does not find this distinction determinative, and it does not strike at the essence of the *IUFA* opinion. The *IUFA* Court stated, "[i]n essence. . . [t]he IUFA flight attendants in this case claim, just as the pilots in *Air Line Pilots Ass'n v. Texas Intern. Airlines*, 656 F.2d 16 (2d Cir. 1981) claimed, that work on a related carrier should be assigned to them." That same basic question underlies any claim for past damages here; the union claims that work on a related carrier should have been assigned to them.

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[1] The Court notes that plaintiff's original complaint did not make any allusions to a distinction between damages and demanding the work itself. FEIA demanded both the work and damages. After the *IUFA* decision, plaintiff amended its complaint to make the claim for damages alone.

Plaintiff seeks to isolate the damage issue from a determination of representation, but the inquiries are inextricable. In order to determine whether the plaintiff is entitled to damages, the court must first conclude that the union is entitled to the work. Deciding the representation issue is a necessary predicate to determining whether a contractual remedy of damages is appropriate.

The *IUFA* Court highlighted several factors that are indicative of representational concerns. First, when the application of previously obtained certification by a union to a newly acquired subsidiary is not clear, a representation issue may be said to exist. Second, whether two related carriers should be treated as a single carrier for representational purposes involves a matter [11] within the National Mediation Board's jurisdiction. *IUF.*1, *supra*, 664 F. Supp. at 158.

FEIA's attempts to show the irrelevancy of the aforementioned factors to the present case in fact demonstrate that FEIA's postulated distinction between damages and injunctive-type relief is not meaningful. First, FEIA argues that in *IUFA*, but not in the case at hand, the result of the implementation of a contractual provision was the reassignment of all of one bargaining unit's work to another, which determined all questions about the representation of the first unit by extinguishing it. It is clear, however, that an award of damages here would effectively require the same determination, namely, that the FEIA bargaining unit has a superior and controlling right to the work. An award of the damages sought here would have the same practical effect on settling representation issues, and extinguishing the possibility of a separate Ransome bargaining unit.

Second, FEIA notes that the *IUFA* Court had to make a preliminary determination of whether the Ransome flight attendants should be considered to be on the Pan Am Seniority List, in order to determine whether any Ransome

employees needed to be displaced. Again, that same essential determination, whether Ransome workers have a right to be considered for the work, is necessary in the case at hand. To grant the damages which the plaintiff seeks, the Court must resolve the right to the work against the Ransome employees.

Plaintiff also looks to the Seventh Circuit decision in *Hutter* [12] *Construction Co. v. Local 139*, 862 F.2d 641 (7th Cir. 1988) to justify its argued distinction between a demand for work and for damages. That case does not support plaintiff's attempt to gloss over the representational issues raised in this dispute. The Court initially notes that *Hutter* arises in an entirely different statutory context than the case at bar. It has been true for some time that, under the National Labor Relations Act, certain contract interpretation questions and some related questions (*e.g.* "unfair labor practice" or "jurisdictional" claims), normally reserved for resolution by the National Labor Relations Board, may be resolved in separate forums simultaneously. *See, e.g., Local Union 33*, 289 NLRB No. 167, 129 LRRM 1311, 1314 (1988). Under the RLA, however, there is no such thing as an "unfair labor practice" or a "jurisdictional" claim, and the FEIA does not indicate any valid authority under the RLA for violating the National Mediation Board's exclusive jurisdiction by submitting representational issues, even when such issues are intertwined with contractual claims, to a Board of Adjustment.

Moreover, even if the different statutory schemes were completely analogous, *Hutter* presented a factual and legal situation different from the case at bar. The *Hutter* court was presented with two concluded determinations; an arbitral award of damages to one union under a contract, and a NLRB determination that a different union had a superior "overall" claim to the work, based on "non-contractual" factors. Under the National Labor Relations Act, disputes between two unions over rights to perform [13] work, or "jurisdictional" disputes, fall under the exclusive

jurisdiction of the NLRB. In determining that the first claim was not jurisdictional, and therefore properly before the arbitral panel, the *Hutter* court noted that the first union would have had an *independent* contractual claim to damages "even if" it had performed the work itself. *Hutter*, *supra*, 862 F.2d at 644. This is directly contrary to the present case; FEIA's claim for backpay here rests squarely upon its failure to secure the work in question.

Additionally, the employer in *Hutter* would have avoided its contractual liabilities by recharacterizing the dispute as purely "jurisdictional," and the Seventh Circuit was concerned by that inequitable result. *Id.* It is not apparent that there would be a similar result in the case before this Court. If FEIA's claim for breach of the scope clause of the collective bargaining agreement still exists after the representational issue is addressed by the National Mediation Board, a Board of Adjustment can resolve that dispute. Finally, the separate nature of the contractual and jurisdictional issues in *Hutter* led that court to conclude that the awards were not inconsistent, and that the jurisdictional determination was not a necessary prerequisite to the award of back pay. As indicated in the discussion above, this is not analogous to the situation presented by this case.

FEIA claims that it is not asking the Board of Adjustment to order a change in the work assignment policy of Pan Am Corp., *see* Plaintiff's Memorandum in Support of Summary Judgment at 14, but [14] it is clear that plaintiff *is* asking the Board of Adjustment to determine that *every time* work is assigned in accord with the existing policy, Pan Am Corp. will incur liability to the FEIA. Characterizing the claim as one for only "past" damages does not alter the practical effect on the prospective work assignments. In order to end double payments, it is likely that PAWA will try to terminate the employment of non-FEIA members, or attempt to recognize the union. A representational stake might even be created, if, by an award

of damages, Ransome employees felt pressure to unionize. FEIA's semantic manipulations do not alter the fact that FEIA is challenging, in a very real way, the work assignment policy of Pan Am Corp., following its acquisition of Ransome.

The case before the Court may not be a traditional dispute over representation, as the union's complaint is best cast in contract terms. But, as the Court in *IUFA* recognized, Ransome employees can have a "representational stake," regardless of the terms in which the representational issues are couched. This representational stake was said to exist in *IUFA* largely because of the presence of the two factors noted above, namely, the question of the application of previously obtained certification to Ransome employees, and whether two related carriers should be treated as a single carrier for representation purposes. Both of these factors clearly exist in the present case.

The Court concludes that this case is not distinguishable from the situation presented in *IUFA*. There, as here, the fundamental [15] organizational and representational rights of workers were involved. This conclusion is consistent with the purposes underlying the Railway Labor Act, which was designed explicitly to protect the rights of employees to organize, or not to organize, as they saw fit. That Act designates the National Mediation Board as the body to insure that such rights are secured. *See, e.g.*, 45 U.S.C. §§151a(2), (3), and 45 U.S.C. §152, Fourth. The District Court in *IUFA* acknowledged that the question there was "close," and this case similarly presents a "close" question. The distinctions between that case and this one, however, are not material or significant for these purposes, and do not alter the conclusion that the dispute involves representational issues. The Court will not divert from the *IUFA* decision.

Conclusion

An issue of representation arises in enforcing the collective bargaining agreement between the FEIA and PAWA. It is settled that a "court may not entertain an action involving . . . a [representation] dispute even if it arises in the context of otherwise justiciable claims." *Int. Bros. of Teamsters v. Tex. Int. Airlines, supra*, 717 F.2d at 159. The National Mediation Board has exclusive jurisdiction in such representational disputes, and the jurisdictional scheme of the RLA does not permit the submission of such questions to a Board of Adjustment, on the hope that the resulting resolution will not be inconsistent with employee representation rights. The National Mediation Board can, [16] as it did subsequent to the *IUFA* decision, accept the union's petition for an election to determine whether it might represent the Ransome OTI's.[2] The National Mediation Board can also clarify the "certification" it issued in 1968 to the FEIA, and determine whether PAWA and Ransome are a "single carrier."

Regardless of what course of action the National Mediation Board takes, it must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented. Only then may the union and the employer, or their arbitrator, establish or interpret contractual working conditions.

[17] For the foregoing reasons, defendants' motion to dismiss on subject matter jurisdiction grounds is granted, and plaintiff's motion for summary judgment is accordingly denied.

SO ORDERED

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[2] In *IUFA* the Circuit Court was satisfied with the subsequent election, in that it underscored the correctness of the District Court's decision that representation issues within the jurisdiction of the National Mediation Board were implicated. *See*, *IUFA*, 836 F.2d at 131.

Dated: New York, New York
July 5, 1989

/s/ Peter K. Leisure
U.S.D.J.

APPENDIX N

STATUTORY MATERIAL

I. Railway Labor Act, Section 2, Fourth; 45 U.S.C. § 152, Fourth

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or their agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

II. Railway Labor Act, Section 2, Ninth; 45 U.S.C. § 152, Ninth.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees des-

ignated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

III. Railway Labor Act, Section 201; 45 U.S.C. § 181

All of the provisions of subchapter I of this chapter except Section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such

carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

No. 89-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,
Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer under the Railway Labor Act can enter into a collective bargaining agreement which contains a successorship clause, then breach that clause by entering into a merger with another RLA employer in which the collective bargaining agreement does not survive, and then escape an arbitral award of damages for its breach by claiming that the merger has rendered compliance with the successorship clause impossible.

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BRIEF IN OPPOSITION

The opinions below, the basis for the Court's jurisdiction, and the statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 1.

STATEMENT OF THE CASE

At the times relevant here, Western Air Lines, Inc. ("Western") and the Association of Flight Attendants, AFL-CIO ("AFA" or "the Union"), were parties to a collective bargaining agreement dated October 1, 1984, which had been negotiated under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). Pet. App. 2a. That

agreement contained, *inter alia*, a successorship clause stating:

> This Agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the provisions of the Railway Labor Act, as amended. [Pet. App. 3a]

In accordance with the RLA, the collective bargaining agreement also provided for arbitration of all disputes over the interpretation or application of contract provisions before a System Board of Adjustment. Pet. App. 2a-3a.

In September 1986 Western entered into a merger agreement with Delta Air Lines, Inc. ("Delta"). The Western-Delta agreement provided, first of all, that on December 18, 1986, Delta was to acquire Western and operate it as a separate subsidiary until March 31, 1987. That agreement also provided that on April 1, 1987, Western was to be merged into Delta and that Western would cease to exist as a separate entity. The merger agreement did not make any provision for survival of the Western-AFA collective bargaining agreement. Pet. App. 3a.

On October 21, 1986, AFA filed a grievance challenging Western's breach of the successorship clause in the collective bargaining agreement. Western refused to arbitrate on the grounds that the grievance raised a representation dispute committed to the exclusive jurisdiction of the National Mediation Board ("NMB"). On January 8, 1987, AFA therefore filed suit to compel arbitration. Pet. App. 3a. The district court dismissed the case for lack of subject matter jurisdiction, holding that arbitration would interfere with the NMB's exclusive jurisdiction to determine who was the post-merger representative of the flight attendants. 662 F.Supp. 1, 3 (D.D.C. 1987). Pet. App. 2a. AFA appealed that adverse decision.

During the pendency of the Union's appeal, the NMB ruled that, as of April 1, 1987, the date of the operational merger of Western into Delta, AFA's certification as the representative of the Western flight attendants was extinguished and the Union no longer represented any employees on the merged airline. *Delta Air Lines/Western Air Lines*, 14 N.M.B. 291 (1987). Pet. App. 5a. The NMB made clear that its decision had no effect whatsoever on the processing of grievances arising out of "vested contractual rights." 14 N.M.B. at 301 and n.2.

On the basis of the NMB's decision, Delta moved to dismiss AFA's appeal as moot. The court of appeals denied that motion on the ground that while a " 'claim based on any right of continued representation' was moot. . . it was 'not clear whether an arbitrator could award damages for breach of the collective bargaining agreement.' " Pet. App. 6a. Therefore, the court below ruled that AFA's grievance, insofar as AFA sought damages for breach of the successorship clause in the Western-AFA collective bargaining agreement, does *not* raise a representation dispute, and that the district court therefore had jurisdiction to order arbitration of AFA's damages claim against Western. Pet. App. 24.[1]

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[1] Two other unions, the International Brotherhood of Teamsters and the Air Transport Employees, also had collective bargaining agreements with Western which contained successorship clauses. These unions each filed suit in the Central District of California to compel arbitration over Western's breach of the successorship clauses, and each sought injunctions preserving the status quo pending arbitration. The Ninth Circuit directed the district court to order arbitration, and enjoined the merger. *IBTCWHA* v. *Western Air Lines, Inc.*, 813 F.2d 1359, 1364 (9th Cir. 1987) ("*Teamsters*").

On April 1, 1987, the date of the operational merger, Justice O'Connor granted the carriers' *ex parte* application for stay of the Ninth Circuit's order. *Western Airlines, Inc.* v. *Int'l Bhd. of Teamsters*, 480 U.S. 1301 (1987) (in chambers). Thereafter, Western and Delta consummated the merger. Pet. App. 5a. This Court subsequently granted *certiorari* in *Teamsters*, vacated the Ninth

ARGUMENT

The decision below is the *first* court of appeals ruling on a novel question: whether an employer covered by the Railway Labor Act may first enter into a collective bargaining agreement containing a successorship clause with a union representing its employees, then breach the undertaking contained therein by entering into a merger agreement with another RLA employer that does not provide for the continuation of the collective bargaining agreement and, finally, escape damages liability for its breach of the successorship promise by claiming that the union's effort to enforce the clause by securing damages creates a representation dispute within the National Mediation Board's exclusive jurisdiction.

The court of appeals—treating the matter as *res nova* and recognizing that successorship clauses are consistent with public policy, that *the* basic principle of contract law is that a contracting party is *not* free to breach its undertakings with impunity, and that in these circumstances a damages award would not interfere with the RLA scheme for determining collective bargaining representatives—ruled that unions may seek to rectify a breach of a successorship clause by seeking damages through arbitration. Pet. App. 23a-24a.

In implicit recognition that the court of appeals reasoning is impeccable, that its conclusion is in complete accord with this Court's federal labor contract jurisprudence as developed in analogous situations, and that, in any event, the issue presented here is in its nascent litigation stage and is not yet worthy of this Court's time and attention, the *certiorari* petition attempts to create a conflict between the decision below and a line of decisions treating

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Circuit's order, and remanded the case to the Ninth Circuit to consider the question of mootness. *Teamsters*, 484 U.S. 806 (1987). The Ninth Circuit, during the pendency of the appeal in this case, dismissed that case as moot in a *per curiam* order. *Teamsters*, 854 F.2d 1178 (9th Cir. 1988). Pet. App. 6a.

with a conceptually distinct legal question. The petition claims that "in order to award damages or any relief, an arbitrator would first have to make a finding . . . that the successor clause of the AFA/Western contract entitled AFA to be recognized by Delta as the representative of former Western flight attendants . . . [and that] such a finding would invade the exclusive jurisdiction of the NMB." Pet. 7.

But, as the court of appeals stated in rejecting the same argument, the petition's premise is wrong and the "specific performance" cases relied on there are therefore inapposite:

> Assuming, as we must in this context, that Western was obliged by the successorship clause to bind any merger partner to the. . . [collective bargaining agreement], an arbitrator might find that Western was required to structure the merger so as to preserve itself as a separate operating entity. In that event, the arbitrator might also find that the NMB's determination to extinguish AFA's certification as representative of the former Western flight attendants was a foreseeable consequence of Western's breach, and that the carrier is liable to AFA for its contract damages. The situation would be no different analytically if the. . . [collective bargaining agreement] had expressly provided for a sum of liquidated damages in the event that Western breached the successorship clause. [Pet. App. 8a-9a].

The short of the matter is this: the question here has been presented to only one court of appeals and is best left to development through the process of litigating elucidation in the lower courts; the court of appeals' answer to that question is sound and is consistent with the applicable general principles developed by this Court; and the decision below is *not* in conflict with any decision in the court of appeals or in this Court.

The *certiorari* petition should be denied.

1. The court of appeals' decision rests on the fundamental principle of labor law that the terms of a collective bargaining agreement establish the "rule of law" which governs the relationship between the contracting parties. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). *Accord*, *Andrews* v. *Louisville & N. R.R. Co.*, 406 U.S. 320, 322 (1972). And, as the court below recognized, that rule applies fully to successorship clauses. Pet. App. 22a-23a.

The decision below is also grounded in a second uncontestable tenet of labor law, namely, that an employer who enters into and subsequently breaches an enforceable promise contained in a collective bargaining agreement must pay the consequence of its breach as determined by an arbitrator. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 569 (1960). Indeed, this Court has explicitly sanctioned an arbitral award of damages once an employer's actions make specific performance of its contractual obligations impossible. *W.R. Grace Co.* v. *Local Union 759*, 461 U.S. 757, 768-69 (1983); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 459 (1957).

Most to the point, this Court has twice rejected petitioner's argument that compliance with an inconsistent contractual obligation insulates an employer from damages liability for breach of a collective bargaining agreement. In *W.R. Grace*, *supra*, 461 U.S. 757, the Court upheld an arbitrator's award of damages for an employer's breach of the collective bargaining agreement, and flatly rejected the employer's defense that its conflicting obligations under a Title VII conciliation agreement rendered compliance with the labor contract impossible. Finding that "[t]he Company committed itself voluntarily to two conflicting contractual obligations," the Court held that the arbitrator's decision merely "allocate[d] to the Company the losses caused by the Company's decision" to

honor one set of obligations at the expense of those contained in the collective bargaining agreement. *Id.* at 767.

Similarly, in *Belknap* v. *Hale*, 463 U.S. 491 (1983), this Court rejected the argument that an employer's strike settlement with a union preempted a damages suit for misrepresentation and breach of contract by strike replacements who had received promises of permanent employment but who were laid off pursuant to the strike settlement. In upholding the viability of the damages suit, the Court spurned the notion that an employer's conflicting obligations arising from an agreement with a union can render "essentially meaningless" the promises contained in an employment contract. *Id.* at 500.

In sum, the decision below—taken in its own terms—is in full accord with this Court's teachings in the *Steelworkers Triology* and in *W.R. Grace* and *Belknap*.[2] Petitioners do not point to a single case in this Court concerning the enforcement of a collective bargaining agreement through a damages award that is to the contrary.[3]

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[2] Justice O'Connor's chambers opinion in *Western* v. *Teamsters*, 480 U.S. 1301 (1989), does not detract from the precedents cited in the text. In the posture in which it reached the Court, that case dealt with the narrow issue of "the effect of the injunction" in preventing the merger. Pet. App. 17a. Justice O'Connor concluded that the injunction there would in fact constitute a ruling on a representation dispute. *Id.* at 1306, citing *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983). As the court below noted, Justice O'Connor's opinion does not address "the question whether a claim for damages might survive a merger." Pet. App. 18a.

[3] Delta does cite three cases in support of its argument that the Court should grant *certiorari* to relieve the company of the inconsistent obligations under which it purportedly finds itself. Pet. 23 n.3, citing *Gondeck* v. *Pan American World Airways Inc.*, 382 U.S. 25 (1965); *Maryland* v. *U.S.*, 381 U.S. 41 (1965); *Int'l Typographical Union* v. *NLRB*, 365 U.S. 705, *rehearing denied*, 366 U.S. 941 (1961). However, in those cases any inconsistent obligations arose out of conflicting judicial decisions. In this instance, as in *W.R. Grace* and *Belknap*, any inconsistent obligations arise not out of judicial action, but because Western chose to honor a merger

2. Having literally no other choice, the petitioner seeks to manufacture a conflict among the circuits. But in each of the cases relied upon in this regard, the union sought not damages but *specific post-merger performance of its collective bargaining agreement, in whole or in part.* In that context, the courts have found that the relief sought was the equivalent of an order establishing *post-merger representation rights*, and that such an order would conflict with the NMB's exclusive jurisdiction to resolve representation disputes. Pet. 10-11.[4]

The court of appeals expressly agreed with the holding in those cases that "the question whether a union's certification survives an airline merger is a matter within the exclusive jurisdiction of the NMB." Pet. App. 13a. The court below, again in complete agreement with the cases relied upon by petitioner, also ruled that AFA has no post-merger right to represent the former Western flight attendants now that the merger has taken place

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agreement in derogation of a promise set forth in its collective bargaining agreement. Thus, these cases are inapposite.

As we discuss below, no conflict among the circuits exists in this case.

[4] *E.g., Air Line Employees Ass'n* v. *Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (court has no jurisdiction over union's suit to enjoin implementation of agreement between carrier and two other unions which promised to grant exclusive representation rights to the rival unions after consummation of an operational merger); *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983) (court lacks jurisdiction where union representing group of employees whose company merged into a larger airline filed suit to force merged airline to recognize it as the employees' representative after the merger); *Bhd. of Ry. & S.S. Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (court lacks jurisdiction to declare union's collective bargaining agreement binding on merged airline); *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.*, 836 F.2d 130 (2d Cir. 1988) (union's attempt to enforce collective bargaining agreement on newly acquired subsidiary raises dispute as to who represents employees of the subsidiary, therefore, court has no jurisdiction).

and the NMB has extinguished AFA's certification, and noted that the Union did not contest this ruling. Pet. App. 8a. However, that court concluded that this fact "simply does not answer the question whether Delta is answerable in damages for Western's alleged *pre-merger* breach of . . . [the successorship] clause." *Id.* (emphasis added).

None of these cases dealing with specific performance of a successorship provision after consummation of a merger addresses whether an employer can first promise not to enter into a particular form of merger, then breach its promise, and having done so, escape liability in damages because of its breach.[5] The court of appeals correctly found that the injunctive or declaratory claims for relief in the cases cited by the petitioner were "*de facto* claims to judicial certification of the plaintiff union's representative status" post-merger. Pet. App. 16a. As already noted, however, the court ruled below that in this case, an arbitrator could find that the successorship clause required Western to structure a merger

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[5] The court below rejected Delta's assertion that the Second Circuit's decision in *Air Line Pilots Ass'n* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), treats with the damages issue presented here. In that case, the union tried to extend its representation rights to employees of a newly established subsidiary through an action to enforce its contract. The union also sought a judicial award of damages for the company's failure to recognize it as the representative of the subsidiary's employees, an issue not presented in the instant case for pre-merger damages. *See* Pet. App. 21a.

Delta also claims that the Ninth Circuit rejected as moot an arbitral award of damages in *Teamsters*, 854 F.2d 1178 (9th Cir. 1988). However, the court below found that the Ninth Circuit merely held moot the unions' request for an order compelling arbitration and an injunction prohibiting the merger. Pet. App. 9a. Thus, the holding merely confirms the unavailability of specific performance post-merger. While AFA's complaint initially sought an injunction pending arbitration as an alternative to expedited arbitration, the Union did not pursue injunction proceedings in this litigation. Thus, the two cases reached the courts of appeals in entirely different postures, and confronted the courts with wholly distinct issues.

so that the company continued to operate as a separate subsidiary, thereby providing for survival of the collective bargaining agreement, and that Western breached this obligation.

Thus, in contrast to the cases relied upon by petitioner, "neither the certification . . . of a representative, nor the functional equivalent thereof, nor anything even remotely akin thereo, is at stake" in an arbitral award of damages for Western's pre-merger breach of contract. Pet. App. 18a. Recognizing that the very point of the enforceability of a successorship clause, like the enforceability of any other provision of a collective bargaining agreement, is to deter violations of the agreement, the court below stated:

> The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its . . . [collective bargaining agreement], it might forego entering into an otherwise desirable merger. [Pet. App. 23a].

There is, we submit, nothing wrong in that; indeed, the raison d'être of the law of contracts is to influence future conduct and to assure that prior promises are kept or damages are paid. Certainly, there is nothing in that basic contract rule that impinges on the NMB's authority and nothing that creates a representation dispute.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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REPLY BRIEF

Petitioner Delta Air Lines, Inc. ("Delta") files this Reply Brief pursuant to Rule 22.5 of the Rules of this Court.

1. *Mootness Conflict.* Perhaps the most astonishing aspect of the Brief In Opposition of the Association of Flight Attendants ("AFA's Brief") is contained in footnote 5 where AFA asserts that the decision in the parallel litigation to this case, *IBTCHWA, Local No. 2702 v. Western Airlines, Inc.*, 854 F.2d 1178 (9th Cir. 1988), Pet., at 64a, is not in conflict with the D.C. Circuit's decision below. By declaring that the D.C. Circuit had considered the Ninth Circuit's decision to involve only a mootness finding concerning the unions' request for post-merger specific performance to prohibit the merger from being consummated and to compel arbitration (AFA's Brief, at 9 n.5), AFA flatly contradicts the opinion of both the Ninth and the D.C. Circuits.

Not only did the D.C. Circuit make no such finding, but its decision expressly acknowledged the irreconcilable conflict between the two circuits. The D.C. Circuit noted that the very same damages argument relied on by AFA "was indeed made in the briefs before the Ninth Circuit . . . [and] [w]ere the Ninth Circuit decision binding precedent in this circuit, it might give us greater cause for concern, since its judgment necessarily, if implicitly, rejected all of the arguments that the unions made." 879 F.2d, at 910, Pet., at 9a. In adopting the same arguments that were rejected by the Ninth Circuit, the D.C. Circuit has created a direct conflict that must be resolved by this Court.

2. *Jurisdiction Conflict.* For the reasons set forth in Delta's Petition, at 12-21, AFA's attempt to distinguish the previously unbroken line of circuit cases upholding the exclusive jurisdiction of the National Mediation Board ("NMB") over representation issues in airline mergers and acquisitions also fails. In a further attempt to avoid this second conflict between the D.C. Circuit decision and other circuit decisions, the AFA's Brief at pages 6 to 7 cites a number of inapplicable cases decided under the National Labor Relations Act ("NLRA") and relies in particular on *W.R. Grace Co. v. Local Union 759*, 461 U.S. 757 (1983), and *Belknap, Inc., v. Hale*, 463 U.S. 491 (1983).

First, AFA's reliance on cases decided under the NLRA is misplaced. Although the NLRA, which applies to most private employers *except* railroads and airlines, bears some superficial resemblance to the Railway Labor Act ("RLA"), the two Acts differ in very significant respects. The courts have recognized that the RLA and NLRA impose quite different obligations upon the parties. *See, e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 391 (1969); *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338, 342-43 (1943); *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d. Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d. 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976). The NMB's sweeping exclusive jurisdiction over representation issues under the RLA and the RLA's requirement of a single carrier-wide representative for each craft or class have no counterparts under and, indeed, are contrary to the procedures under the NLRA. By contrast under

the NLRA, the National Labor Relations Board ("NLRB") has only primary, *not* exclusive, jurisdiction over representation issues, *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278-79 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), and a union may be certified to represent any "employer unit, craft unit, plant unit or subdivision thereof." 29 U.S.C. § 159(b). Thus, the RLA is quite different from the NLRA in the area of representation issues and cases under the NLRA are simply not germane in this area.

Second, AFA's attempt to analogize the *W.R. Grace*, *supra*, and *Belknap*, *supra*, cases to the instant case is also erroneous. Both cases involved an employer's conflicting contractual obligations under two contracts which the employer had entered into. The instant case, however, does not involve such a conflict between two contracts. Rather the instant case, unlike *W.R. Grace* and *Belknap*, involves a government agency's exclusive statutory jurisdiction over the subject matter and its decision exercising that jurisdiction. That is the critical difference and makes those cases of no relevance here. The purported contractual obligation that AFA asserts here is in conflict with the NMB's exclusive jurisdiction over representation disputes (as well as the NMB's decision). In *W.R. Grace* and *Belknap*, none of the employer's agreements were in conflict with any law, agency jurisdiction, or agency decision.

The issue here is not, as AFA suggests, a contractual defense of impossibility of compliance with the collective bargaining agreement, but rather the issue here is jurisdiction. The RLA, not Western's or Delta's alleged breach of contract, divests courts and

arbitrators of jurisdiction to decide any aspect of this representation dispute, including damage remedies. Regardless of how the representation dispute arises, the RLA vests exclusive jurisdiction over such matters in the NMB.[1]

AFA also argues that there is nothing wrong in a carrier having to forego entering into an otherwise desirable merger as a consequence of the carrier being potentially liable in damages for an alleged breach of a successorship clause by the acquired carrier. AFA's Brief, at 10. AFA ignores the fact that mergers like this one are often the only way to protect the jobs of employees at the acquired carrier and also maintain continuity of service to the public, because the acquired carrier cannot survive alone. Moreover, AFA's theory has the same purpose and would accomplish the same result as the injunctive relief, which the D.C. Circuit acknowledged it has no authority to grant. A carrier, as a practical matter, would be unable to proceed with a transaction in the face of con-

[1] If *W.R. Grace* or *Belknap*, cited by AFA, somehow supported AFA's argument that there is jurisdiction here, then the many cases cited by Delta in its Petition (See in particular pages 11 and 15 to 20 of the Petition) would have had the opposite result, as would presumably the Ninth Circuit's decision that the related cases there were moot and the D.C. Circuit's earlier decision that AFA's representation claims are moot. *See e.g., Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (where the carrier had entered into a collective bargaining agreement which was alleged to have been breached by its merger agreement, but the Seventh Circuit, like many other courts, found no jurisdiction because the union's contract grievance claim involved a representation dispute). Neither *W.R. Grace* nor *Belknap* confers jurisdiction in this or any of those previously cited cases.

flicting and unpredictable rulings regarding the parties' rights and obligations with respect to questions of representation.

Nor does AFA's suggestion that Delta—and other acquiring carriers—could avoid such liability by structuring the transaction so that both carriers continue as separate operating entities, avoid the problem. That suggestion is also part of the injunctive relief which AFA (and the other two unions in the Ninth Circuit) originally sought and were denied based on all prior court and NMB decisions on the issue. In addition, most acquisitions only make economic sense if the two carriers can be fully merged, particularly in the case of a financially weak or failing carrier. Further, trying to keep the two carriers separate would subject the purchasing carrier to potentially conflicting arbitrations, as well as NMB proceedings instituted by rival unions. It was to avoid such conflicts that Congress gave the NMB exclusive jurisdiction over all disputes involving representation rights. These points are more fully expressed in the Brief of the Airline Industrial Relations Conference and the Air Transport Association of America as *Amici Curiae* Supporting Certiorari, at 13-15.

3. *Conclusion.* Delta respectfully requests that this Petition be granted to resolve the conflicts raised by this case, which are of vital national importance to our critical air and rail transportation industries.

October [illegible], 1983

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(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,

Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICI CURIAE* SUPPORTING CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, a union grievance which seeks damages for a claimed breach of a collective bargaining agreement's successor clause—purportedly requiring a merged airline to recognize the union as the representative of a minority group of employees after a merger—raises issues of employee representation within the exclusive jurisdiction of the National Mediation Board.

2. Whether the National Mediation Board's decision terminating the union representation certification of the acquired carrier's union, as of the date of the merger, renders moot the union's request to arbitrate a grievance involving representation issues under a successor clause.

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BRIEF OF AMICI CURIAE THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA

INTERESTS OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court, the Airline Industrial Relations Conference (AIRCON) and the Air Transport Association of America (ATA) file this brief as Amici Curiae in support of the Petition for a Writ of Certiorari of

Petitioner Delta Air Lines, Inc. (Delta).[1] AIRCON and ATA adopt and support the arguments of Petitioner Delta that the National Mediation Board (NMB) has exclusive jurisdiction over all representation disputes, regardless of the context in which they arise. AIRCON and ATA file this brief amici curiae in order to emphasize the importance of this matter to airline industry labor relations and to provide the Court with the special history and perspective of the airline industry.

AIRCON and ATA have a substantial interest in the disposition of this case. AIRCON is an unincorporated voluntary association of twenty-one United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters. AIRCON represents its member air carriers with respect to related legislative, judicial and administrative proceedings. ATA is a Washington based trade and service association of twenty-one United States airlines and two Canadian airlines. The membership of AIRCON and ATA include every major air carrier in the United States.[2] Because AIRCON and ATA air carrier members are covered by the Railway Labor Act, 45 U.S.C. sections 151-188 (RLA), they will be directly and substantially affected in their labor relations by the resolution of this case.

The decision of the D.C. Circuit creates uncertainty and unpredictability with respect to the rights and

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[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

[2] AIRCON and ATA member carriers are listed in the Appendix.

obligations of parties covered by the Railway Labor Act involved in transactions such as mergers, acquisitions, and asset sales. An interpretation of the Railway Labor Act which permits unions to arbitrate disputes involving representation issues, albeit under the guise of breach of contract claims for monetary damages, would deprive the industry of its well-established reliance upon the National Mediation Board as the sole forum for resolving all representation issues. If forced to adjudicate representation related claims in a multitude of forums, one of the key features of the RLA, which has been relied upon by unions and employers alike,. would be severely undermined. Since it is likely that the industry will be involved in many transactions which may raise representation issues in the coming years, it is important that parties be able to predict with some degree of reliability what their rights and obligations will be in connection with any potential transaction. Reversal of the D.C. Circuit's unprecedented decision is of fundamental importance to fulfill the RLA's purposes of creating uniformity, stability, and predictability in airline and rail labor law. For these reasons, AIRCON and ATA respectfully submit this brief as Amici Curiae.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Prior to this case, the uniform body of authority had made clear that the NMB has exclusive jurisdiction over all claims that entail issues of employee representation. This Court's rulings in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), followed by subsequent appellate and district court cases, have definitively held that representation

disputes are outside the jurisdiction of federal courts and private arbitrators. Although AFA - and the D.C. Circuit - characterize this dispute as a grievance raising breach of contract issues, the subject matter of the dispute is a disagreement regarding the rights and obligations of a labor organization and an airline with respect to representation of the airline's employees following a merger. The merit of AFA's damage claim is dependent on a determination that AFA was entitled to continue as the post-merger representative of the Western flight attendants. Therefore, the dispute is inextricably intertwined with representational issues, which only the NMB can resolve.

In the airline industry, it was previously well-settled that labor and management were required to refer all representation disputes arising out of mergers and other corporate transactions to the NMB. Throughout the post-World War II era, air carriers have engaged in over 30 mergers out of which have arisen numerous representation claims. These representation claims have been decided by the NMB - not by arbitrators or federal courts, even though almost every airline union contract contains some provision upon which a claim of successorship could be raised. By having a single forum where these issues can be determined, the parties have been able to resolve these disputes with finality and reliability. This has avoided the uncertainty and fragmentation of jurisdiction and bargaining units that can result in unnecessary labor strife in industries covered by the National Labor Relations Act. In so doing, it has benefited carriers, employees, and the public.

Failure to reverse the D.C. Circuit's decision would radically alter the previously well-established law and

the airline industry's approach to transactions which raise representation issues. The possibility of open-ended damage awards would affect the manner in which parties structure transactions, just as surely as would injunctive or declaratory relief. The D.C. Circuit's decision would fragment the jurisdictional framework for representation matters, and lead to labor instability, split bargaining units, and legal unpredictability. That result is antithetical to the labor policies embodied in the Railway Labor Act.

ARGUMENT

STABLE AIRLINE LABOR RELATIONS AND ECONOMIC GROWTH NECESSITATE THAT THE AIRLINE INDUSTRY HAVE A SINGLE FORUM—THE NATIONAL MEDIATION BOARD—WHICH RESOLVES ALL QUESTIONS OF REPRESENTATION RAISED BY MERGERS AND OTHER TRANSACTIONS.

In the airline industry, all representation disputes arising from mergers and other corporate transactions have been handled by the National Mediation Board. This is consistent with the universally recognized legal principle that the "NMB alone is vested with the final decision-making authority over representation issues." *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 NMB 388 (1987) (NMB Airline Merger Procedures); *see also Western Airlines v. International Brotherhood of Teamsters*, 480 U.S. 1301 (1987) (J. O'Connor); *Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 479 U.S. 962 (1986). The D.C. Circuit's decision, by fragmenting the adjudicatory process with respect to representation issues, has thrown this previously settled area of

law into question. With hundreds of millions of dollars at stake in these transactions, along with tens of thousands of jobs, the potential impact of the D.C. Circuit's misapplication of the law should not be underestimated.

A. Mergers and Corporate Transactions In The Airline Industry

Since 1945, there have been over 30 airline mergers. Most of today's carriers are a product of past mergers over many years. A partial list of the current airlines and their merged entities would include:

Alaska - Jet America

American - Air Cal, Trans Caribbean

Braniff - Florida Express, Mid-Continent

Continental - New York Air, People Express, Pioneer, Texas International

Delta - Chicago & Southern, Northeast, Western

Eastern - Colonial

Federal Express - Flying Tigers, Seaboard, Slick

Midway - Air Florida

Northwest - Bonanza, Challenge, Hughes Air West, Monarch, North Central, Pacific, Republic, Southern, West Coast

Pan Am - American Overseas, National, Panagra

TWA - Ozark

United - Capitol

USAir - Empire, Lake Central, Mohawk, Pacific Southwest, Piedmont

Besides mergers, there have also been a number of sales of assets or routes involving the transfer of employees, such as United's acquisition of Pan Am's Pacific Routes. In many instances, the merger, or other corporate transactions, has saved a financially ailing carrier from failure along with the jobs of thousands of its employees.

This pattern of airline mergers and acquisitions, which began during regulated times, has continued throughout the deregulated era, as the industry, reacting to market forces, has undergone a massive consolidation.[3] Future mergers and corporate transactions which raise representation disputes will certainly be forthcoming. Several financially weak carriers have indicated that they will almost certainly need to be acquired or merged. Many carriers are either acquiring, buying an interest in, or entering into marketing and operating agreements with regional feeder airlines.[4] Other carriers are entering into

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[3] Between 1985 and 1988, the Department of Transportation approved the following acquisitions or mergers: USAir-Pennsylvania Commuter (85-5-115); Midway-Air Florida (85-6-33); Southwest-Muse (85-6-79); People Express-Frontier (85-11-58); United-Pan American Pacific Routes (85-11-67); Piedmont-Empire (86-1-45); Horizon-Cascade (86-1-67); People Express-Britt (86-2-34); Northwest-Republic (86-7-81); Presidential-Key Airlines (86-8-32); United-People Express/Frontier (86-8-33); Alaska-Jet America (86-9-18); TWA-Ozark (86-9-29); Texas Air-Eastern (86-10-2); Texas Air-People Express (86-10-53); Delta-Western (86-12-30); Alaska Air-Horizon (86-12-61); USAir-Pacific Southwest Airlines (87-3-11); American-Air California (87-3-80); USAir-Piedmont (87-10-58). References are to DOT docket numbers.

[4] Examples of these commuter airline relationships would include: American-American Eagle; Northwest-Northwest Airlink; Pan Am-Pan Am Express.

financial and marketing arrangements with foreign airlines, such as KLM's purchase of an interest in Northwest, Swissair and Delta buying stock in each other, and British Air's proposed investment in United.[5]

Generally, past airline mergers have proven to be a financial success for the surviving carrier, and beneficial to the combined work force. Since deregulation started in 1978, airline employment has soared nearly 50% from 329,000 to 480,000.[6] As the bulk of the air carriers are heavily unionized, union membership has also grown substantially.

B. Representation Issues in Airline Mergers and Corporate Transactions

Although airline mergers and similar corporate transactions are primarily business transactions, they inevitably create questions of employee representation. In some instances, the same union may represent the employees in the same craft or class on both carriers. This is particularly common with pilots, where the Air Line Pilots Association (ALPA) frequently represents the pilots on both carriers. However, with many other employee groups, the employees of carrier A and carrier B either have different unions or one employee group may have preferred to remain unrepresented.

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[5] Even the unions are now interested in acquiring airlines. The Air Line Pilots Association has joined with United's management in the proposed buyout of the carrier.

[6] Air Transport 1989, The Annual Report of the U.S. Scheduled Airline Industry (ATA Report) at 12. Copies of the ATA Report have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

Where the merger involves different unions - or the larger carrier is non-union - the NMB has often ruled that the certification of the minority union on the smaller carrier is extinguished upon the operational merger of the two carriers. *See e.g. USAir/ Pacific Southwest Airlines, Inc.*, 15 NMB 135 (1988); *Republic Airlines/Hughes Air West*, 8 NMB 49 (1980). Not surprisingly in such situations, the minority union - such as AFA at Delta/Western - will pursue every avenue in an effort to extend its status as the representative of its former members.

However, with the exception of the D.C. Circuit opinion, the courts have unanimously held that there is only one avenue available for pursuing representation matters - and that avenue is the NMB. In situations where the NMB's "majority of the craft" rules result in a favorable outcome for a union, the union is quite willing to go down this avenue. Conversely, where the NMB's rules would produce a result unfavorable to the union, the unions have sometimes sought relief from the courts or arbitrators, usually under the guise of enforcing the successorship or scope clause provisions of the minority union's contract. However, the courts have repeatedly recognized that disputes involving representation and other issues may not be split apart for separate resolution by separate adjudicators. *See* e.g. *Western Air Lines v. International Brotherhood of Teamsters*, supra; *Air Line Employees Association v. Republic Airlines*, supra; *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983).

Vested with exclusive jurisdiction over representation claims arising from mergers, acquisitions, and

other corporate transactions, the NMB has responded by exercising its authority over a variety of situations including:

- mergers of unionized carriers; e.g. *Northwest/Republic Airlines,* 13 NMB 399 (1986);

- mergers of unionized and non-union carriers, the pending merger of *Federal Express/Flying Tigers*, 16 NMB 433 (1989);

- creation of non-union sister airline by holding company of unionized carrier, *Frontier/ Frontier Horizon*, 11 NMB 138 (1984);

- purchase of non-union carrier by holding company of unionized carrier, *Transamerica/TransInternational*, 12 NMB 204 (1985); and

- common ownership of multiple commuter carriers, serving as feeder lines to two different major airlines, *Metro Airlines*, 16 NMB 353 (1989).

The statutory requirement of having the NMB handle all merger and corporate transaction related representation issues has worked well for all parties. For the traveling public, there have been no labor disruptions to service, as over 30 mergers have proceeded without producing a single strike. For management, they have been able to rely upon the Board's past precedents, so they can know what their rights and obligations are with respect to representation. For the unions, they have usually been able to ascertain quickly what their post-merger status will

be, and avoid unending, intramural bouts between majority and minority unions.[7]

C. The D.C. Circuit's Opinion Upsets Well-settled Law and Creates Uncertainty and Unpredictability with Respect to Airline Representation Disputes

The airline mergers and acquisitions described above succeeded - on the whole - because the surviving carrier, in accordance with the policies of the RLA, was able to meld two separate groups of workers into one cohesive unit. Once the surviving carrier has launched the operational merger, it must quickly integrate the work forces and operate as a single carrier with the combined workforce which is vital to the economic success of the new venture. As the NMB itself recognized in *Republic Airlines/Hughes Air West, supra,* the surviving airline must act expeditiously to create a consolidated carrier:

> To do this it needs to be able to integrate its work force. The current agreement restrictions which apply to mechanics and jurisdictional restraints on work on aircraft demonstrate the inherent inefficiency of a two carrier system for representation purposes.

The Fifth Circuit, endorsing the *Republic/Hughes Air West* decision, agreed with the NMB's view that permitting certifications to survive a merger "would reduce the ability of airlines to integrate operations

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[7] For the minority union, the NMB has evolved special procedures which make it easier for an ousted union to obtain an election to gain representation rights. *NMB Airline Merger Procedures,* 14 NMB at 391-92.

and to maintain a single system." *Teamsters v. TXI, supra*, 717 F.2d at 163. The court pointed out that:

> One clerk would have a union representative; two of his neighbors would be unrepresented. One employee's working conditions and grievance procedures would be governed by a collective bargaining agreement; two of his neighbors would not. We defer to the Board's rationale, based on the board's expertise and the statutory delegation of authority to it, to determine disputes concerning who are the representatives of the carrier's employees.

Id.

If, as AFA wants, the minority union were to survive the merger, such consolidation could well be impossible. Transition agreements are difficult enough to achieve with just one union per craft or class. They may become impossible to achieve where two unions are vying to gain a competitive advantage over one another. Multiple, split representation status perpetuates disunity and cripples the carrier's efforts to form a cohesive workforce. One can only imagine the labor chaos which would confront Northwest today if it still had to apply Bonanza's contracts; or USAir if it had to deal with Mohawk's unions. Carrying AFA's proposal to its logical end, an airline could face a situation wherein part of the craft represented by one union could go out on strike, while the other part of the craft, with a different representative, remained on the job.

In its opinion, the D.C. Circuit suggests that such fears are unfounded. The court indicates that it is not interfering with the NMB or intruding into the

representation aspects of a merger, but merely giving the minority union the opportunity to obtain monetary damages for the alleged breach of the successorship clause. Contradicting the holdings of every other judicial body, the D.C. Circuit attempts to separate the inseparable. While acknowledging that the successorship clause was unenforceable in a representation context, the court nonetheless found that it is fully viable as a breach of contract claim:

> Although those [congressional] policies do support a rule that a successorship clause cannot be specifically enforced, they simply do not require that an award of damages for breach of such a clause be barred.

879 F.2d at 916-17.

In a side comment, the opinion goes on to state that:

> The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its CBA, it might forego entering into an otherwise desirable merger.

879 F.2d at 917.

What the D.C. Circuit ignores is that these "otherwise desirable merger(s)" in many cases are the only practical means to protect jobs as well as to provide continuity of service to the public. A merger may not only be "desirable" to the acquiring carrier, but absolutely vital to the purchased airline.

Moreover, the threat of prolonged arbitration proceedings resulting in unpredictable, open-ended damages, can negatively affect a transaction just as surely

as can an injunction, which the D.C. Circuit concedes it has no authority to issue. While technically denying the union an injunction, the D.C. Circuit has given the union a tool which is nearly as powerful. A carrier would find it difficult to proceed with a merger - or other substantial acquisition - knowing that the result could be an unpredictable damages award.

As if to emphasize this point, AFA suggests, and the D.C. Circuit assumes, that in order to avoid liability, Delta - and other acquiring carriers - should structure the acquisition so that both carriers continue as separate operating entities, albeit under the umbrella of one holding company. That, of course, is part of the injunctive relief which AFA (and the Teamsters and Air Transport Employees unions in the Ninth Circuit) originally sought. And, for the reasons expressed by the NMB and every other court that has ruled on the issue, it is not a viable option in either economic or legal terms.

From an economic viewpoint, without a full merger of the two carriers, most acquisitions cannot produce the operational synergies and efficiencies necessary to maintain a viable enterprise. This is particularly likely to be true where a "failing" carrier is involved.

From a legal standpoint, even if a purchaser might keep the two carriers separate in an effort to avoid unpredictable damage awards, the legal ramifications could be devastating. The purchasing carrier would be exposed to potentially conflicting arbitration awards, as well as NMB proceedings instituted by rival unions. The majority union on the purchasing carrier, airline A, might obtain an award finding that its scope clause extends to the acquired carrier, airline B. Or the majority union might instigate a "single

carrier" representation proceeding before the NMB, which could result in a ruling that the certifications on carrier A extend to - and extinguish the minority union certifications on - carrier B. At the same time, the minority union on carrier B may obtain an arbitration award in its favor based on its successorship clause. In short, the purchasing carrier would be faced with arbitration awards that not only conflict with one another, but also with the determination of the NMB.

It is precisely to avoid such conflicting and irrational results that Congress gave the NMB exclusive jurisdiction over all disputes involving representation rights.

CONCLUSION

Representation disputes arise frequently in connection with airline mergers and similar transactions. By vesting the National Mediation Board with exclusive jurisdiction over all aspects of representation claims, Congress ensured that the transaction could proceed in a rational and predictable fashion, while the representation rights of the employees and the union are equitably resolved in a uniform and democratic manner. The decision of the D.C. Circuit would disrupt this successful system and threaten unnecessary disruption to air carriers, employees, and unions.

Accordingly we respectfully urge that this Court grant the petition for a writ of certiorari, and reverse the D.C. Circuit Court's opinion.

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APPENDIX

APPENDIX

AIR Conference Members

ABX Air

Alaska Airlines, Inc.

Aloha Airlines, Inc.

America West Airlines

American Airlines, Inc.

Braniff, Inc.

Continental Airlines, Inc.

Delta Air Lines, Inc.

Eastern Air Lines, Inc.

Federal Express Corporation

Midway Airlines, Inc.

Northwest Airlines, Inc.

Pan American World Airways, Inc.

Reeve Aleutian Airways, Inc.

Southwest Airlines

Tower Air

Trans World Airlines, Inc.

The Trump Shuttle

United Airlines, Inc.

United Parcel Service

USAir, Inc.

ATA Members

Alaska Airlines, Inc.

Aloha Airlines, Inc.

American Airlines, Inc.

American TransAir

Braniff, Inc.

Continental Airlines, Inc.

Delta Air Lines, Inc.

DHL Airlines

Eastern Air Lines, Inc.

Evergreen International Airlines

Federal Express Corporation

Hawaiian Airlines

Midway Airlines, Inc.

Northwest Airlines, Inc.

Pan American World Airways, Inc.

Southwest Airlines

Trans World Airlines, Inc.

The Trump Shuttle

United Airlines, Inc.

United Parcel Service

USAir, Inc.

Associate Members

Air Canada

Canadian Airlines International

(5)

No. 89-459

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DELTA AIR LINES, INC., PETITIONER

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

QUESTIONS PRESENTED

1. Whether, after two air carriers merge, the National Mediation Board's exclusive jurisdiction over representation disputes bars arbitration of a union's claim for damages based on the alleged violation by one of the carriers of the successorship provision of its collective bargaining agreement.

2. Whether a union's request for arbitration of its damages claim for breach of a successorship provision in a collective bargaining agreement is rendered moot by the National Mediation Board's termination of the union's certification as representative.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-459

DELTA AIR LINES, INC., PETITIONER

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Railway Labor Act (RLA or Act), 45 U.S.C. 151 *et seq.*, governs labor relations in the rail and air transportation industries. Under Section 2 Ninth of the Act, 45 U.S.C. 152 Ninth, the National Mediation Board (NMB) has the authority to investigate representation disputes and to certify bargaining representatives for a craft or class. The NMB's jurisdiction to resolve representation disputes is exclusive and is not subject to judicial review. *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943).

The RLA creates separate procedures for "minor" disputes—disputes over the interpretation or application of a collective bargaining agreement. See *Consolidated Rail*

Corp. v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989). The Act requires that such disputes be resolved through conferences and compulsory arbitration. 45 U.S.C. 152 Sixth. In the airline industry, these disputes are presented to system adjustment boards consisting of representatives of the union and the carrier. 45 U.S.C. 184. The NMB does not have power to adjudicate minor disputes. Its involvement is limited to appointing a neutral referee if a system board deadlocks, see *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 683 (1963), and interpreting the "meaning or the application" of agreements reached through mediation, if either party so requests. 45 U.S.C. 155 Second.[1]

2. Respondent Association of Flight Attendants (AFA) was the certified representative of the flight attendants on Western Airlines, Inc. As required by the Act, Western's 1984 collective bargaining agreement with AFA established a System Board of Adjustment to resolve grievances arising from the interpretation or application of the agreement. The agreement also included a "successorship" clause providing: "This agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the Railway Labor Act, as amended." Pet. App. 3a.

In September 1986, Western entered into a merger agreement with Delta Air Lines. Under the agreement, in December 1986, Delta was to acquire 100% control of Western, and in April 1987, Western was to be merged into Delta and to cease independent operations. Until the operational merger, Western would continue to honor its collective bargaining agreement with AFA. The mer-

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[1] A third category of RLA dispute (not at issue in this case) is a "major" dispute, which involves a conflict over a proposal to change rates of pay, rules, or working conditions. 45 U.S.C. 152 Seventh 156; *Pittsburgh & L. E. R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2589 n.4 (1989).

ger agreement did not purport to bind Delta to the Western-AFA collective bargaining agreement. Pet. App. 3a, 28-29a.

3. Before the merger's initial step, AFA filed a grievance against Western, alleging that Western had breached the successorship provision by failing to bind Delta to the collective bargaining agreement. When Western denied the grievance on grounds that it raised representation issues within the exclusive jurisdiction of the NMB, AFA submitted it to the System Board of Adjustment. Western failed to arbitrate.

After the first step of the merger took place, AFA filed a complaint in the United States District Court for the District of Columbia to compel arbitration. AFA requested expedited arbitration or, alternatively, the preservation of the status quo pending arbitration. As relief in the arbitration, AFA sought the restructuring of the merger so as to bind Delta to the existing collective bargaining agreement, or, in the event that Western failed to do so, the payment of damages. Pet. App. 3a-4a, 28a.

The district court dismissed AFA's complaint, holding that it raised a representation dispute within the exclusive jurisdiction of the NMB. Pet. App. 27a-33a. The court stated that when representational issues are intertwined with arguably independent "minor disputes," courts should not undertake to separate the two, thereby dividing jurisdiction between the NMB and a system board of adjustment. *Id.* at 31a.

4. a. In another action commenced prior to the consummation of the merger, two other Western unions sued Western in the United States District Court for the Central District of California to compel arbitration. Like AFA, these unions alleged that Western had breached the successorship clauses of their collective agreements. The unions requested injunctive relief against completion of the merger pending arbitration. The district court denied relief, but in March 1987 the Ninth Circuit issued an order compelling arbitration and enjoining the merger until the arbitration was completed or until the

airlines stipulated that the arbitration would bind the successor corporation. *IBTCWHA, Local Union No. 2707* v. *Western Air Lines, Inc.*, 813 F.2d 1359, 1364 (1987). At the carriers' request, Justice O'Connor stayed that order pending the filing and disposition of a petition for certiorari. *Western Airlines, Inc.* v. *International Bhd. of Teamsters*, 480 U.S. 1301 (1987) (O'Connor, J., in chambers).

b. Following the stay of the Ninth Circuit's order, the operational merger of Delta and Western took place. Delta requested the NMB to determine whether the certifications of Western's unions were extinguished as a result of the merger. To answer that question, the NMB applied the factors bearing on whether the merger had produced a single transportation system, as set forth in *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 (1987).[2] On July 9, 1987, the NMB ruled that, the merger having eliminated Western as a separate operating entity, the certifications of the unions at Western were extinguished as of April 1, 1987. Pet. App. 60a-62a.

c. On October 5, 1987, following the NMB's decision, this Court granted the petition for a writ of certiorari in the Ninth Circuit case, vacated the judgment, and remanded for consideration of mootness. *Delta Air Lines, Inc.* v. *International Bhd. of Teamsters*, 484 U.S. 806 (1987). On remand, the Ninth Circuit dismissed the ac-

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[2] If a merger results in the integration of two carriers' operations into a single transportation system, the NMB will generally determine that the certification of a union representing the acquired carrier's employees (who have become a minority in the new entity) has been extinguished. (Alternatively, the NMB in its discretion may order an election.) The NMB applies a multi-factor test in making that determination, and it may reach different results for different crafts or classes of employees. See, *e.g.*, *Trans World Airlines/Ozark Airlines*, 14 N.M.B. at 237-240. In contrast, if a merger results in the carriers' retaining separate transportation systems despite common ownership or control, the NMB will not extinguish existing union certifications.

tion as moot, stating that "none of the relief sought in the original complaint is now available." *IBTCWHA, Local Union No. 2702* v. *Western Air Lines, Inc.*, 854 F.2d 1178, 1178 (1988).

5. In an opinion issued after these developments, the court of appeals in this case reversed the district court's dismissal of AFA's complaint. The court first held that AFA's damages claim was not moot because the breach-of-contract allegations—if proved—could support a damages award in arbitration. Pet. App. 7a.[3] Turning to Delta's jurisdictional arguments, the court held that arbitration of AFA's successorship claim was not precluded by the NMB's exclusive jurisdiction over "representation disputes." The court explained that, regardless of an arbitrator's decision on AFA's damages claim, the NMB would still enjoy the exclusive power to certify or decertify a representative of Delta's employees. The court therefore concluded that arbitration of AFA's damages claim would not undermine the exclusive jurisdiction of the NMB. *Id.* at 13a-18a.

The court also held that an arbitration remedy for damages was not precluded simply because the arbitration would involve what Delta characterized as a "representation issue." The court reasoned that to extend the NMB's authority to cover all "representation issues" would be inconsistent with the specific functions assigned to the NMB in the Railway Labor Act, and would conflict with the Act's goal of encouraging "conciliation, mediation, and arbitration" as the favored means of resolving labor disputes. Pet. App. 22a (quoting *General Committee of Adjustment* v. *M.-K.-T. R.R.*, 320 U.S. 323, 332 (1943)).

Finally, the court dismissed Delta's suggestion that if the NMB itself lacks power to provide a damages remedy in a case such as this, then no tribunal can do so and

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[3] The court noted that another D.C. Circuit panel had previously found AFA's claims seeking "continued representation" to be moot, but had directed further briefing on whether AFA's claims for damages were moot. Pet. App. 6a.

the union is left without a remedy. Pet. App. 22a-23a. The court found no public policy that justified rendering successorship provisions "unenforceable and of no effect." *Id.* at 22a.

DISCUSSION

Petitioner urges that the arbitration ordered by the court of appeals—involving AFA's damages claim for Western's alleged pre-merger breach of a successorship clause—infringes upon the exclusive jurisdiction of the NMB over representation disputes. We do not agree with that contention, nor do we believe it warrants this Court's review. The arbitration involved here would not interfere with the exclusive authority of the NMB over representation disputes. Rather, allowing the arbitration to go forward is fully compatible with the statutory plan to entrust representation disputes exclusively to the NMB and to entrust minor disputes over contract application exclusively to arbitrators.

Nor do we believe that this case conflicts with decisions of other courts of appeals. Several decisions have barred unions from pursuing contract claims for injunctive or declaratory relief on the ground that the resolution of those claims would effectively determine a representation dispute that is committed to the NMB. Neither the holdings nor rationales of those cases require the denial of arbitral jurisdiction to consider a claim for damages for a pre-merger breach of a successorship provision. While one very recent decision of the Second Circuit rejected a union's request, following an airline acquisition, to compel arbitration of a claim for contract damages, the facts of that case are significantly different from those presented here. Any tension in rationales between the two decisions does not warrant this Court's review at present. Finally, we do not believe that certiorari is required because of fears that the decision below will create a climate of uncertainty inhibiting airline mergers. Such concerns are speculative, and, in any event, are not rooted in policies deriving from the RLA.

While there is a technical conflict between the decision below and the result reached by the Ninth Circuit

on the second question presented (mootness), we do not perceive a need for this Court to review that issue. The decision below is consistent with well-established principles of mootness. Moreover, the Ninth Circuit did not discuss or explicitly decide the issue presented here, and may well have viewed the issue of damages as not resolved by its opinion. Thus, in our view, the petition for certiorari should be denied.

1. Petitioner's central claim (Pet. 8-14) is that because the RLA vests exclusive authority over representation disputes in the NMB, it precludes arbitration of a union's request for damages based on an alleged breach of the successorship provision in a collective bargaining agreement. Nothing in the scheme of the Railway Labor Act requires that result.

a. Neither the language nor the underlying policies of the RLA require the denial of arbitration here. 45 U.S.C. 152 Ninth governs "any dispute * * * among a carrier's employees as to who are the representatives of such employees," and sets forth procedural mechanisms for the NMB to use in investigating the dispute and in certifying the proper representative. Following such certification, the carrier shall 'treat with the representative so certified as the representative of the craft or class." *Ibid.* It is settled that the courts lack authority to intervene in such representation disputes, which are entrusted exclusively to the NMB. *Switchmen's Union* v. *National Mediation Bd., supra.*

The arbitration requested by AFA would not require an arbitrator (or a court) to perform any functions that the Act assigns exclusively to the NMB in 45 U.S.C. 152 Ninth. In particular, a system board of adjustment would not be called upon to determine which union (if any) is the representative of Delta's flight attendants. Nor would Delta be obliged to "treat with" any particular representative as a result of an arbitral award. As a result, the representation rights secured for employees by the RLA—the right "to organize and bargain collectively through representatives of their own choosing" and the

right of a "majority of any craft or class * * * to determine who shall be the representative of the craft or class" (45 U.S.C. 152 Fourth)—would not in any way be compromised by the arbitration sought by AFA.

A system board considering AFA's claim would only have to take actions fully appropriate to the board's function of resolving contract disputes. The board would have to consult the collective bargaining agreement, determine the meaning and application of the successorship provision, and consider any defenses raised. If the system board concluded that the agreement reflected Western's promise to structure any merger so as to preserve the independent identity of its operations, and thereby to bind Western's successor to the AFA collective bargaining agreement, damages may be available to remedy a breach of that promise. Such an award would simply compensate AFA for Western's violation of a contractual undertaking. It would not undermine the authority of the NMB to certify a representative based on events as they actually unfolded.[4]

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[4] Much of petitioner's argument that this case involves a representation dispute depends on its formulation of the issue that would be put to the arbitrator—whether "the successor clause of the AFA/Western contract entitled AFA to be recognized by Delta as the representative of former Western flight attendants" (Pet. 7). That formulation mischaracterizes AFA's claim. AFA does not claim entitlement to recognition by Delta. As AFA reads the successor clause, it "imposed upon Western conditions *precedent to* a merger, and dictated that Western could engage in only those types of corporate transactions where there was no legal or other impediment to the successor's assumption of the Agreement." Resp. C.A. Br. 12 (emphasis in original). There is no dispute that an airline merger can be arranged so as to permit a successor to assume a collective-bargaining agreement; indeed, the parties here arranged the first step of their merger transaction to accomplish such a result.

Of course, whether a court agrees with AFA's interpretation of the successor clause is not the issue. "Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's

Petitioner argues (Pet. 12-14) that since injunctive relief pending arbitration of AFA's claim would be unavailable in light of 45 U.S.C. 152 Ninth, a damages remedy must also be denied. There is no anomaly, however, in holding that a damages remedy is not barred, although an injunction might impermissibly intrude upon the NMB's functions. Cf. *W. R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 769 n.13 (1983) ("Compensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy."); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 507 (1983) ("We need not address the [specific performance] issue * * * since respondents seek only damages."). Indeed, such a distinction is basic to the law of contract remedies. See 3 Restatement (Second) of Contracts § 365, Comment a. (1981).

An injunction that continues or extends the application of a collective bargaining agreement, even to preserve the status quo, can effectively determine the core issue of representation in derogation of the NMB's exclusive authority. See, *e.g.*, *International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983).[5] Precluding such an injunction protects the

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claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but * * * by the arbitrator." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-650 (1986).

[5] *Texas Int'l Airlines* explained how an injunction in aid of contract rights can infringe upon NMB's jurisdiction. There, after two airlines merged, a union that had been recognized by the smaller of the two carriers sued for a declaration that its collective bargaining agreement remained valid and for an injunction ordering the Company to comply with the agreement until another representative was certified. 717 F.2d at 158, 160. The court held that it had no jurisdiction to enforce the collective bargaining agreement, explaining that the union played an "indispensable role in administrating the

NMB's unique role under the RLA, a role designed to facilitate labor peace and to clarify representation rights. No similar rationale, however, applies to the arbitration of a grievance seeking only damages for a carrier's pre-merger breach of a successorship provision. Because such an arbitration does not interfere with the NMB's role in investigating and resolving representation disputes, the principles developed with respect to injunctive relief do not apply.

The conclusion that the NMB's authority over representation disputes is not threatened here is reinforced by considering the interplay with other dispute-resolution mechanisms created under the Railway Labor Act. Although the NMB alone certifies representatives, the Act does not call for the NMB to interpret or apply collective bargaining agreements. Indeed, the NMB is not even authorized to determine the arbitrability of minor disputes under the Act, as to do so "would seriously interfere with NMB's neutrality in labor-management relations." *Ozark Air Lines, Inc.* v. *NMB*, 797 F.2d 557, 564 (8th Cir. 1986). In minor disputes, resort to the system boards of adjustment is mandatory. *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. at 687-689. The arbitral process was intended to reduce tensions over contract-related grievances, which might otherwise escalate and cause interruption of the Nation's transportation services. *Ibid.*

Consistent with the allocation of contract disputes to the system boards of adjustment, the NMB refused to inject itself into Delta's processing of grievances from the former Western unions in this case. Pet. App. 61a. The

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agreement," and that "[c]ontinuation of the contract in force unavoidably constitutes a determination of employee representation." *Id.* at 161. The court thus believed that "[g]iven the [NMB's] undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164.

NMB has also formalized its recognition of the limitations on its jurisdiction under 45 U.S.C. 152 Ninth in its "Merger Procedures" for the airline and railroad industries.[6] In the procedures for airlines, the NMB identified the following express limitations on its authority over representation disputes: (1) "These procedures are not a bar to the effectuation of voluntary recognitions otherwise permissible under the Act"; (2) "[t]hese procedures shall not act to inhibit the processing of pending grievances otherwise permissible under the Act"; (3) "[t]hese procedures shall have no effect on the survival of existing collective bargaining agreements"; and (4) "[t]he Board recognizes that when a dispute involves the interpretation or application of an airline collective bargaining agreement, Section 204 of the Railway Labor Act, 45 U.S.C. § 184, provides that it be referred to an appropriate adjustment board for resolution through arbitration." *Merger Procedures, Subp. F—Effect of Procedures*, 14 N.M.B. at 394-395. See also 17 N.M.B. at 55-56 (parallel limitations applicable to rail carrier mergers). Those limitations reflect the RLA's division of authority between the NMB and the system boards. The allocation of responsibilities under *Merger Procedures* is entirely consistent with the court of appeals' holding in this case; both further the underlying goal of the Act to promote the peaceful settlement of labor disputes in the transportation industry.

Since the NMB clearly has no power to hear a claim that Western breached the successorship provision or to award damages, petitioner's argument, if accepted, would render that provision unenforceable in the pres-

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[6] See *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry (Merger Procedures)*, 14 N.M.B. 388 (1987); *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989).

ent context. The invalidation of the provision of the AFA-Western contract, however, is not justified here. Although "a court may not enforce a collective-bargaining agreement that is contrary to public policy," the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W. R. Grace*, 461 U.S. at 766; *United Paperworkers Int'l Union* v. *Misco, Inc.*, 108 S. Ct. 364, 373-374 (1987). Applying those principles, the Court ruled in *W.R. Grace* that an arbitrator could hold a company liable in backpay for laying off employees in violation of a collective bargaining agreement, even though the layoffs were conducted under the mandate of a conciliation agreement that the company had entered with the Equal Employment Opportunity Commission. The Court explained: "The dilemma * * * was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations." 461 U.S. at 767. See also *Belknap, Inc.* v. *Hale*, *supra* (no preemption of state court damages action by employees who were laid off as a result of settlement of federal unfair labor practice complaint).

The same principles apply here. As in *Grace*, petitioner points to no source of law that justifies invalidating Western's contract. Its only argument is that the decision of a system board would somehow conflict with the NMB's exclusive authority to resolve representation disputes. As we have discussed, that is not so. Rather, under AFA's reading of the collective bargaining agreement, Western simply made two conflicting contractual commitments. Its agreement with AFA, the union contends, constituted a commitment to remain a separate carrier for representation purposes, while its merger agreement with Delta committed it to form a single transportation system. Although AFA cannot obtain specific performance of its contract by requiring Delta to "treat with" AFA as representative of the flight attend-

ants, AFA may seek damages for the breach. Cf. *W.R. Grace*, 461 U.S. at 768-769 & n.12.[7]

b. We do not agree with petitioner's contention (Pet. 15-22) that this case conflicts with decisions of other courts of appeals considering merger or acquisition-related issues under the RLA. Many cases, of course, have found particular contract claims barred by the exclusive jurisdiction of the NMB.[8] In those cases, however, a union sought to continue its representational

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[7] Of course, if an arbitrator were to enter an award that impermissibly strayed into areas reserved to the NMB under the RLA, such a decision would be voidable in post-award judicial review. We see no reason, however, to preclude the arbitral process at the outset because of some remote possibility that an award could be held improper.

[8] See, *e.g.*, *Independent Union of Flight Attendants (IUFA)* v. *Pan American World Airways, Inc.*, 664 F. Supp. 156 (S.D.N.Y. 1987), aff'd per curiam, 836 F.2d 130, 131 (2d Cir. 1988) (rejecting union's claim for arbitration of the question whether the collective-bargaining agreement covered jobs on a newly acquired, but separately operated, airline); *Air Line Employees Ass'n* v. *Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam) (rejecting claim by a union that the court should declare invalid an agreement by the larger carrier in a planned merger to recognize rival unions as the representative of the post-merger workforce), cert. denied, 479 U.S. 962 (1986); *International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (rejecting claim by a post-merger minority union for a "declaratory judgment that [the union's] collective bargaining agreement is still in force and will remain effective until another employee representative is certified"); *ALPA* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981) (rejecting claim by incumbent union for an injunction requiring carrier to use union pilots on newly formed subsidiary in accordance with collective bargaining agreement); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975, 977-979 (1st Cir.) (rejecting claim that acquiring carrier was obligated to bargain with a union representing the acquired carrier's employees; but reserving question whether acquiring carrier had to arbitrate grievance), cert. denied, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576, 577 (6th Cir. 1963) (rejecting claim for a declaration that the acquiring carrier was bound by the collective-bargaining agreement between the union and the acquired firm), cert. dismissed, 379 U.S. 26 (1964).

status after a merger or acquisition, or to extend its certification to cover additional jobs, through the medium of an action purporting to enforce its collective-bargaining agreement. The courts in those cases found that the claims involved "representation disputes" because the collective-bargaining agreements could not be enforced without a determination of the unions' representative status. In that setting, the courts reasoned, a federal court decision would improperly resolve the very issue of current and future representation reserved to the NMB.

Since the present dispute involves a claim solely for damages for a pre-merger breach of the collective bargaining agreement, it does not require an arbitrator (or a court) to determine present representation rights. AFA is not seeking prospective application of its collective-bargaining agreement to Delta. Instead, AFA is seeking damages on the basis of Western's pre-merger decision to merge with Delta in a way that assertedly breached the successorship clause. Thus, the underlying rationale of the cases cited by petitioner does not apply here. Although the unions in some of the cited cases may have expressly or implicitly sought damages in addition to equitable relief, the heart of the claim in each instance was a request for prospective relief affecting ongoing labor relations. As a result, none of the appellate decisions cited by petitioner squarely considers or analyzes the implications of a request for damages alone.[9]

A recent decision of the Second Circuit did address a union's arbitration request for damages alone. In *Flight Engineers' Int'l Ass'n (FEIA)* v. *Pan American World*

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[9] Only *ALPA* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981), even mentions damages, indicating in passing that the complaint sought a judicial grant of "damages and injunctive relief," with an injunction and specific enforcement of the collective bargaining agreement being the primary objective of the suit. *Id.* at 17-18. The court's holding, however, was simply that *judicial* intervention was not warranted. *Id.* at 24. As the court below noted (Pet. App. 21a), given the limited role of the courts under the RLA, a judicial award of damages is plainly impermissible for contract claims. *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972). An arbitral award of damages stands on an entirely different footing.

Airways Inc., No. 89-7911 (Feb. 13, 1990), the court of appeals refused to order arbitration of a claim that an airline had breached a "scope" clause in a collective-bargaining agreement. The scope clause required the carrier or its subsidiaries to use union-represented employees for all of a designated type of work. FEIA asserted that the carrier had breached the clause by employing non-union personnel on a newly acquired regional airline. After the decision in *IUFA* v. *Pan American World Airways, Inc.*, *supra*, which held that a court lacks jurisdiction to compel arbitration of an analogous scope-clause claim seeking work reassignment, the union amended its grievance to seek only damages. The court of appeals found that FEIA's claim was nonetheless governed by *IUFA* because both cases "implicated representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes." *FEIA*, slip op. 5.

The rationale of the Second Circuit's holding in *FEIA* is in some tension with the present decision. It might be possible to recast the grievance in *FEIA* as a claim that the scope clause required Pan American to arrange any airline acquisition so as to permit FEIA to perform the work on the newly acquired carrier, and that Pan American had breached the clause by failing to do so when acquiring Ransome. So stated, the claim in *FEIA*, like the claim in this case, would flow from a single pre-merger act. Thus, under the theory accepted by the D.C. Circuit, such a reformulated claim by FEIA might have merit.

Nevertheless, the cases are significantly different on their facts. As the district court in *FEIA* pointed out, 716 F. Supp. 110, 115 (S.D.N.Y. 1989), the damages relief sought by the union in that case for breach of the scope clause would be triggered "*every time*" the acquiring carrier assigned work to an employee not represented by the union. Consequently, the Second Circuit

believed that "an award of the damages sought here—or even a realistic threat of such an award—would have the same practical effect" on representation rights as an injunction reassigning the work. Slip. op. 6. Here, in contrast, the basis of AFA's damages claim is that a single pre-merger action by Western—entering the merger agreement with Delta—constituted a breach of the successorship clause. A damages award for such a claim would not be equivalent to an injunction governing future representation rights. Moreover, the Second Circuit's approach in scope-clause cases appears to derive in part from a particular concern that arises in those cases. A union's claim that every assignment of work to non-union employees constitutes a breach of an ongoing collective agreement may well interfere with the independent interests of those employees in retaining their jobs and in choosing a representative.[10] Such a concern is not implicated, however, by a union's claim that a carrier is liable in damages, for breach of a successorship clause in an agreement no longer in force, because the carrier agreed to a merger that resulted in loss of the union's certification.[11]

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[10] The district court in *IUFA* (whose reasoning the Second Circuit endorsed in affirming, see 836 F.2d at 131) stressed that "the unrepresented flight attendants who worked Ransome's flights in the past and who now service the Pan Am Express flights have 'a representational stake' in the matters raised." *IUFA* v. *Pan American World Airways, Inc.*, 664 F. Supp. at 159. See also *FEIA*, slip op. 6-7.

[11] The Second Circuit itself distinguished the present decision by pointing out that the NMB had already extinguished AFA's certification by the time of the D.C. Circuit's decision; "thus, in view of the NMB's conclusive determination of the representation issue, a court order compelling arbitration of the damages claim would not interfere with the NMB's exclusive jurisdiction." *FEIA*, slip op. 8. While this is a factual distinction between the cases, we have some doubt of its significance, at least in the context of a claim under a successorship clause. Before the NMB decided the representation dispute in this case, AFA's damages might have been somewhat indefinite, but the claim itself had no potential to interfere with the NMB (whatever effect it might have on the parties' willingness

Because there is no direct conflict, any tension in rationales does not, in our view, warrant review by this Court. Nor does the decision below warrant review on the theory that it conflicts with Justice O'Connor's opinion granting a stay in *Western Airlines, Inc.* v. *International Bhd. of Teamsters*, 480 U.S. 1301 (1987). That opinion addressed only the question whether an injunction against the Delta-Western merger would impermissibly determine a representation dispute reserved to the NMB. This case, in contrast, raises the separate question whether AFA may obtain arbitral damages based on its claim that Western's merger agreement with Delta breached Western's successorship clause.

Given the paucity of decided cases dealing with claims solely for damages, we believe that further development of the law in the lower courts would be desirable. The rule governing claims for injunctive relief is well settled, and there is no reason to believe that the courts of appeals will diverge on damages claims like the present one. To be sure, cases like *FEIA* present harder questions, and the correct application of recognized principles in that context is as yet uncertain.[12] This Court would likely benefit from further ventilation of those questions in the lower courts.

c. Petitioner also asserts (Pet. 26-30) that this Court's review is necessary because of the possible uncertainties created by the prospect of damages in arbitration. We disagree. Although the risk of damages for breach of a successorship provision conceivably could influence the structure or viability of some airline mergers, more likely it would simply affect the price at which a transaction remains attractive. The union's claim for damages stands on the same footing as any claim against the acquired company: the post-merger entity generally

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to proceed). As we have noted, however, the two decisions are distinguishable on other grounds.

[12] In any event, a decision affirming in the present case, which we believe would be the correct result, would not necessarily explain the application of those principles to cases like *FEIA*.

inherits the acquired company's liabilities. Compare *John Wiley & Sons, Inc.* v. *Livington*, 376 U.S. 543, 550 n.3 (1964); *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 305 (1972) (Rehnquist, J., concurring in part and dissenting in part). And, to the extent that companies seek to arrange their transactions to accommodate existing collective bargaining rights, that choice is fully consistent with the policies expressed in the RLA.

What is more, the ultimate significance of the decision is uncertain. Petitioner may successfully contend in arbitration that the successorship clause was never intended to govern a comprehensive operational merger that destroyed the airline's independent existence. And even if liability for a breach is established, it is far from clear what the measure of damages would be. Finally, while we understand that successorship provisions may currently be common in airline labor contracts, management is free to bargain for more limited or precise provisions in future agreements.

At all events, even if some airline mergers are affected by the decision below, the policies of the Railway Labor Act do not provide a basis for changing that result. If Congress determines that the enforcement of successorship clauses adversely affects air or rail systems, it can provide a legislative remedy. Existing RLA provisions should not be stretched beyond their proper bounds to deny the claim asserted here.

2. The second question presented by the petition, regarding the asserted mootness of AFA's damages claim, also does not warrant review. Under well-established principles, a claim for money damages in a labor dispute is sufficient to prevail against a mootness argument, even when prospective relief is no longer available because the employer has left the business, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 459 (1957), or the union has been decertified, *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 441-442 (1984). In our view, therefore, the decision below is correct. Petitioner's arguments (Pet. 22-26) that this case is moot because no damages could

conceivably be awarded are largely a reformulation of the jurisdictional arguments discussed above.

Although we agree with petitioner that the decision below conflicts with the Ninth Circuit's disposition of the parallel litigation involving other Western unions in *IBTCWHA, Local Union No. 2702* v. *Western Air Lines, Inc., supra*, resolution of that technical conflict does not call for this Court's use of its limited certiorari resources. The unions' efforts in the Ninth Circuit litigation were concentrated on injunctive relief to preserve their continued representational status pending arbitration. As Justice O'Connor noted in her opinion granting a stay, the unions claimed in the Ninth Circuit that "completion of the merger would moot their claims under the collective bargaining agreement to System Board arbitration." *Western Airlines, Inc.*, 480 U.S. at 1309. And one of those unions (the Teamsters) also contended before the NMB that a decertification order would enable petitioner "to claim that the Teamsters' legal case has been rendered moot by intervening events." Pet. App. 54a-55a.

Although the unions later attempted to salvage their claims by recasting them to include the possibility of damages, the Ninth Circuit did not discuss the impact of a damages claim on mootness. Indeed, the court said only that "the relief sought was an order compelling the union to arbitrate and an injunction prohibiting the merger," and that since the merger had taken place "none of the relief sought in the original complaint is now available." Pet. App. 65a. The opinion also hinted that unspecified "post-merger" claims might require a different analysis. 854 F.2d at 1178. In view of the substantial uncertainty as to the meaning of the Ninth Circuit's per curiam disposition, and particularly in light of this Court's recent restatement of the basic principles governing mootness claims, see *Lewis* v. *Continental Bank Corp.*, No. 87-1955 (Mar. 5, 1990), the question of mootness does not merit this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1990

* The Solicitor General is disqualified in this case.

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No. 89-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,
Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF OF DELTA AIR LINES, INC., IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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SUPPLEMENTAL BRIEF OF DELTA AIR LINES, INC., IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

INTRODUCTION

Petitioner Delta Air Lines, Inc. ("Delta") requests that the Court consider this response to the brief submitted by the Solicitor General ("S.G.") on March 13, 1990 on behalf of the United States.[1] The reasons for Delta's request are as follows:

1. The S.G.'s brief deals with the recent decision of the Second Circuit Court of Appeals in *Flight Engineers International Association v. Pan American World Airways, Inc.*, No. 89-7911, slip op. (2d Cir. Feb. 13, 1990) ("*FEIA*"), which case is particularly pertinent here because it compounds the already existing conflict among the various circuits. In Delta's view the S.G. does not deal adequately with *FEIA* and attempts to minimize the conflict between it and the present case, although conceding that *FEIA* "is in some tension" with the D.C. Circuit's decision in the present case. The discussion below demonstrates that *FEIA* not only is in "some tension" with the D.C. Circuit decision, but that there is a firm and distinct conflict between the D.C. Circuit decision in this case and cases in the Second and other circuits.[2]

2. The S.G. argues that the D.C. Circuit decision is fully consistent with the statutory plan of the Railway Labor Act because ordering arbitration on the issue of damages will

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[1] References to the Solicitor General's brief will be cited as "S.G. Brief, p. ____."

[2] Counsel for Delta has been advised that counsel for FEIA, the union in *FEIA v. Pan Am*, also believes that *FEIA* is directly in conflict with the present case and that counsel for FEIA intends to file today or shortly thereafter a petition to seek review of that case by this Court. Accordingly, the Court may wish to hold the present matter in abeyance until it has had an opportunity to review the petition to be filed in *FEIA*, which reinforces the need to grant certiorari in this case.

in no way interfere with the exclusive jurisdiction of the National Mediation Board ("NMB") over representation disputes. What the S.G. overlooks is that the question is one of jurisdiction over the subject matter of the dispute, not of remedies. If a contractual provision attempts to affect representation—as does the successorship provision here—only the NMB has jurisdiction to consider a dispute concerning that provision and a court has no jurisdiction to order arbitration of such a dispute. As Delta shows below, the distinction between remedies in the form of damages and injunctive relief is irrelevant in the analysis of whether the courts have jurisdiction to order arbitration because the question is whether the dispute involves representation, not the nature of the relief sought.

3. The S.G. argues that the law should be allowed to develop further before the Court decides the issue. Delta shows below that the conflict between the circuits is fully developed and that there is no basis upon which to postpone deciding the issues presented by this case.

DISCUSSION

A. Conflicts with Other Circuits

1. *Flight Engineers International Association v. Pan American World Airways, Inc.*

The dispute in *FEIA* arose when Pan American World Airways ("Pan Am") acquired another airline, Ransome Airlines, Inc. ("Ransome"), in the same way that Delta's acquisition of Western Air Lines ("Western") led to the present dispute. Unlike Delta-Western, however, Pan Am continued to operate Ransome as a separate airline. FEIA claimed that by reason of its collective bargaining agreement with Pan Am, Pan Am was required to utilize FEIA-represented employees to perform all applicable work on any airline, such as Ransome, which was owned or operated by Pan Am.

When Pan Am refused to honor FEIA's claim, FEIA filed a grievance, which it sought to have referred to a

System Board of Adjustment for arbitration. FEIA requested as relief both the assignment of work to the FEIA-represented personnel and damages. (Both forms of relief traditionally are requested in all labor arbitration proceedings, as they were in the present case and as they would have been in all of the other RLA cases cited in the parties' previous briefs and in the S.G.'s brief.) Pan Am refused to submit the matter to the System Board, asserting that FEIA's grievance raised a representation dispute within the exclusive jurisdiction of the National Mediation Board ("NMB"), and FEIA filed suit.

In January of 1988, while FEIA's lawsuit was pending in the district court, the Second Circuit decided in Pan Am's favor another case involving the same issues raised by another union arising out of the same acquisition of Ransome. *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 836 F.2d 130 (2d Cir. 1988) (per curiam), *aff'g*, 664 F. Supp. 156 (S.D.N.Y. 1987). Thereafter FEIA amended its grievance to eliminate any claim to specific performance but continued to seek damages. The district court nevertheless ruled in favor of Pan Am, holding that the System Board did not have jurisdiction because the grievance raised a representation dispute within the exclusive jurisdiction of the NMB, regardless of the relief sought. On February 13, 1990 the Second Circuit affirmed. A copy of the Second Circuit's opinion is reproduced as the Appendix, *infra*.

In substance, the *FEIA* opinion and its reasoning are in direct conflict with the D.C. Circuit's opinion in the present case. Pages 5 and 6 in particular contain a confirming discussion of the essential arguments asserted in Delta's briefs in the present case, particularly the fact that a union would be likely to use the threat of a large damage award to avoid the NMB's policies and to secure guaranteed future representation status to which it would not otherwise be entitled. App., 4a-5a, *infra*. The Second Circuit expressly rejects FEIA's argument that the Second Circuit's earlier decision in *IUFA* can be distinguished on grounds that FEIA seeks only damages. The Second Circuit specifically notes

that IUFA sought damages in addition to specific performance. (*FEIA*, slip op., at 6, App., 4a, *infra*)

In the last paragraph of the opinion, however, the Second Circuit, after having affirmed the district court's reasoning and after noting that it "would ordinarily stop at this point," addresses the D.C. Circuit's decision in the present case. The Second Circuit asserts that the present case is inapposite for two reasons. The first is that the present case is contrary to controlling precedent in the Second Circuit (*i.e.*, *IUFA*). The second is that, by the time of the D.C. Circuit's decision in the present case, the NMB had ruled on the representation issues raised by AFA. Thus, as an alternative reason, the court states in dictum that the present case might be distinguished on the basis that a court order compelling arbitration of AFA's claim could not interfere with the NMB's exclusive jurisdiction because the NMB had already issued a ruling in the matter.

Delta maintains that the Second Circuit's alternative reasoning in this regard is factually and legally incorrect, for several reasons. First, in the case which the Second Circuit cites as controlling precedent, *IUFA v. Pan Am*, the NMB had issued a ruling on the representation issues raised by IUFA's complaint subsequent to the district court's ruling but before the Second Circuit's ruling, just as the NMB did in the present case. In *IUFA* the Second Circuit had said "We believe that these events underscore the correctness of the district court's decision that representation issues within the jurisdiction of the Mediation Board are implicated in the instant matter." 836 F.2d at 131. Moreover, in *FEIA*, slip op., at 6, App., 4a, *infra*, the Second Circuit explicitly notes that the union in *IUFA* also sought "make whole" relief, "*i.e.*, money damages, as FEIA does here." Despite the fact the NMB had already determined the representation issue in *IUFA*, the Second Circuit refused to order arbitration of either the specific performance or damage issues. Accordingly, even if *FEIA* somehow were distinguishable from Delta on this basis, a clear and unequivocal conflict still remains between the present case and *IUFA* (as well as with the Ninth Circuit decision in *IBTCHWA*,

Local No. 2702 v. Western Air Lines, Inc., 854 F.2d 1178 (9th Cir. 1988)). Thus, every Circuit decision (other than the present case) in which a separate damage issue was expressly asserted (two in the Second Circuit and one in the Ninth), rejects such a claim and reaches the same conclusion as all of the other cases cited in our briefs, even through the NMB had already issued a ruling in two of those three cases.

Moreover, under the Second Circuit's alternative reasoning in *FEIA*, a U.S. District Court's subject matter jurisdiction would depend solely upon the vagaries of the timing of another agency's ruling. Such a standard is, to our knowledge, without any legal basis and it would cause such terribly inconsistent results and create such incentives for parties to try to affect the timing of the rulings by courts and agencies that it would be utterly unworkable. It should be noted in this regard that, at the time AFA's grievance was filed in the present case, and at the time that the district court issued its ruling on AFA's complaint, the NMB had *not* ruled on the representation issues.

Even the S.G. agrees that the Second Circuit's rationale in dictum distinguishing *FEIA* and the present case is inappropriate. (*See* S.G. Brief, p. 16, n. 11.) The S.G. instead asserts that the cases are different on their facts because in *FEIA* the damages sought by the union for breach of the collective bargaining agreement would be triggered every time the acquiring carrier assigned work to an employee not represented by the union. In the present case, in contrast, the damages presumably would be levied in one fell swoop. If, as the S.G. seems to accept, "an award of the damages sought [in *FEIA*]—or even a realistic threat of such an award—would have the same practical effect" on representation rights as an injunction (*see* S.G. Brief, p. 16, quoting *FEIA*, slip op., at 6), it is difficult to understand how a similar threat based upon a successor clause as in the present case (with a potentially greater damage award) would not have a similar effect with respect to future transactions, and, indeed, with respect to this transaction. (*See* discussion at p. 10, *infra*.)

Contrary to the S.G.'s suggestion, there is nothing speculative about those effects. For example, in future transactions (regardless of the manner in which the transactions are structured), one or more unions would be likely to file or threaten a substantial damages claim as soon as the transaction is announced or agreed upon, with the goal, not of proceeding with the damages claim, but rather of using the threat to guarantee or enhance the future representational status of that particular union. That is precisely what the Second Circuit in *FEIA* found to be impermissible under the RLA's statutory scheme. *FEIA*, far from being different from the present case on its facts, demonstrates that whenever one carrier acquires another, no matter what the form of the transaction may be, unions, if permitted to do so, will seek to use the threat of damages to avoid the NMB's jurisdiction over representation issues. In this regard, both *FEIA* and *IUFA* directly conflict with the rationale of the D.C. Circuit in the present case.

B. Other Cases

Although the S.G. concedes (S.G. Brief, p. 14.) that "the unions in some of the [other] cited cases may have expressly or implicitly sought damages in addition to equitable relief" (just as AFA sought both forms of relief in the present case), the S.G. claims that "the heart of the claim in each instance was a request for prospective relief affecting ongoing labor relations." This does not change the fact that, even after prospective relief in the form of specific performance was denied, in none of the cases was a union permitted to pursue the damages portion of its claim. Thus, the holdings in those cases, and the rationales cited in support of those holdings, are in direct conflict with the holding and rationale of the D.C. Circuit in the present case, as discussed in Delta's Petition at pages 14-21.

2. The S.G. Incorrectly Argues That The Decision Of The D.C. Circuit Is Consistent With The Statutory Scheme Of The Railway Labor Act.

The S.G. says that allowing arbitration on the damages issue in this case is fully compatible with the statutory plan

under which representation disputes are within the exclusive jurisdiction of the NMB and minor disputes are within the exclusive jurisdiction of arbitrators. (S.G. Brief, p. 6.) His assertion is incorrect, however, because he has failed to recognize that when disputes involve both representation issues and contract issues, the courts have consistently held that the exclusive jurisdiction of the NMB must prevail even though this means that intertwined contract disputes may not be resolved. The S.G. expresses concern that if Delta's position were accepted, the successorship provision would be rendered "unenforceable in the present context" (S.G. Brief, at pp. 11-12.), and he argues that such unenforceability cannot be justified unless the provision is contrary to public policy which "must be well-defined, and is to be ascertained 'by reference to the laws and the legal precedents and not from general considerations of supposed public interest,' " citing *W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*, 461 U.S. 757, 766 (1983).

The fact of the matter is that in this context, public policy is indeed well-defined and is ascertained by reference to the Railway Labor Act and numerous cases decided thereunder which deal specifically with this issue. These are, of course, the cases that Delta has cited earlier and which Justice O'Connor described as "the great weight of case law" in this area. *Western Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987).

The S.G. fails to recognize this, and instead asserts that this case is governed by *Grace* and *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). Those cases are quite different, however, from the present case. In the present case, Delta is *not* asserting a defense based upon conflicting contractual obligations as was the case in *Grace* and *Belknap*. In those cases, the employers had entered into contractual obligations with federal government agencies and the employers said their actions were required under such contractual arrangements, excusing them from other duties. In those cases, this Court held that entering into a contractual ob-

ligation with a government agency could not excuse the breach of other duties. In the present case, Delta does not assert that it should be excused from honoring the successorship clause because of any conflicting contractual duty. Thus, the principles set forth in the *Grace* and *Belknap* cases are inapposite to this case. The question presented here relates only to whether the successorship clause may be enforced under the applicable provisions of the Railway Labor Act and decisions under that Act; *it has nothing to do with any conflicting contractual obligation of Western or Delta.* In dealing with the issue the courts have not found it necessary to deal with the question of enforceability as such because they never got that far. *The reason is that they first had to deal with the question of jurisdiction.* The courts have decided in the cases previously cited that where representation questions are intertwined with contract issues, the NMB's exclusive jurisdiction must be honored and that the courts have no jurisdiction to order arbitration of the related contractual issues.

In this connection, it seems helpful to consider the nature of the successorship clause. Quite clearly, one of the primary purposes of the union in negotiating such a clause was to attempt to assure its continued representation status *by contract.* The interpretation of any such contract necessarily involves issues of representation that otherwise would be resolved by the NMB and, accordingly, any interpretation of such a provision by an arbitrator *must* result in a determination affecting representation. It is no answer to say that because the NMB has already decided representation this cannot be changed by an arbitrator. Nor is it an answer to say that the provision does not really deal with representation because an arbitrator might find that it only required Western "to structure any merger so as to preserve the independent identity of [Western's] operations, and thereby to bind Western's successor to the AFA collective bargaining agreement." (S.G. Brief, p. 8.) *Neither of those facts changes the crucial fact that the clause attempts to control representation through contract and not through the NMB's processes pursuant to 45 U.S.C. § 152 Ninth.* If the

contract could have the effect of controlling representation then an arbitrator in interpreting the contract is deciding matters of representation in violation of the NMB's exclusive jurisdiction, and a court would similarly violate that jurisdiction by ordering arbitration of such a clause. There is no occasion to consider whether a damage award would interfere with the NMB's exclusive jurisdiction because the analysis should never go that far.

Moreover, the distinction that the union and the S.G. have tried to draw between damages and injunctive relief is misconceived in this context. As the Second Circuit recognized in *FEIA*, the threat of a damage award can be just as compelling as injunctive relief insofar as matters of representation are concerned. Even though in the present case the NMB has ruled that the AFA's right to represent the former Western employees was terminated, and even though an arbitrator cannot change that decision, there could still be a direct effect on representation if an arbitrator is allowed to decide that Western somehow breached its successorship obligation with the result that Delta could be subject to a substantial damages award. If that should occur, the union could place significant pressure on Delta to voluntarily recognize the union as the representative of former Western employees or all of the merged craft or class of flight attendants. Such a result would invade the NMB's exclusive jurisdiction *and* would be inconsistent with the provisions of the Railway Labor Act, which are intended to guarantee that a majority of the employees in a craft or class will be allowed to select their representative.

3. The S.G. Incorrectly Argues That There Should Be Further Development of the Law Before the Court Decides This Issue.

The S.G. says "Given the paucity of decided cases dealing with claims solely for damages, we believe that further development of the law in the lower courts would be desirable." (S.G. Brief, p. 17.) It is difficult to see how the conflict between the circuits could be more clear or what could be gained from further litigation. To the contrary, a

great deal could be lost through allowing the uncertainty created by the D.C. Circuit decision to continue. As we have pointed out in earlier briefs, the uncertainty created by the D.C. Circuit decision is a very real and subsisting problem that could affect decisions as to whether transactions will occur, and if so, how they will be structured. Perhaps more importantly, employee representation rights under the Railway Labor Act will have been distorted.

Despite the S.G.'s arguments, there is a distinct conflict between the D.C. Circuit decision and all other circuit decisions in this area. The S.G.'s argument that other cases had not clearly examined the damages issue is incorrect in view of the recent *FEIA* decision, as well as the earlier decision of the Second Circuit in *IUFA*. Moreover, damages were necessarily a possible remedy in all the other cases cited in earlier briefs, as the S.G. concedes.

For the foregoing reasons, Delta again respectfully requests that its Petition be granted. In the alternative, Delta requests that the Court hold the matter in abeyance until it has had a chance to review the Petition for a Writ Certiorari in *FEIA v. Pan Am.*

March 23, 1990

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 701 **August Term 1989**

Argued: January 18, 1990 Decided: February 13, 1990

Docket No. 89-7911

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,
Plaintiff-Appellant,

- against -

PAN AMERICAN WORLD AIRWAYS, INC., and PAN AMERICAN CORPORATION,
Defendants-Appellees.

Argued: January 13, 1990 Decided: February 13, 1990

Before: FEINBERG, PRATT and MAHONEY, Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York, Peter K. Leisure, J., granting motion of defendants-appellees Pan American World Airways, Inc. and Pan American Corporation to dismiss complaint of plaintiff-appellant union, which sought an order compelling arbitration, for lack of subject matter jurisdiction.

Affirmed.

DAVID B. ROSEN, New York, NY (O'Donnell & Schwartz, of Counsel), for Plaintiff-Appellant.

RICHARD SCHOOLMAN, New York, NY (Eikenberry Futterman & Herbert, of Counsel), for Defendants-Appellees.

FEINBERG, Circuit Judge:

Plaintiff-appellant Flight Engineers' International Association (FEIA) appeals from a judgment of the United States District Court for the Southern District of New York, Peter K. Leisure, J., granting the motion of defendants-appellees Pan American Corporation (Pan Am Corp.) and Pan American World Airways, Inc. (PAWA) to dismiss the amended complaint for lack of subject matter jurisdiction. Pan Am Corp. is a holding company and is not an airline; PAWA is its wholly owned airline subsidiary. The amended complaint charged that Pan Am Corp. and PAWA violated section 204 of the Railway Labor Act (the Act), 45 U.S.C. § 184, and the parties' collective bargaining agreement (the Agreement) by refusing to arbitrate what FEIA characterized as a contractual dispute arising under Article 1(B) of the Agreement. Article 1(B), known as a scope clause, requires PAWA to use exclusively FEIA-represented Operations Training Instructors (OTI's) employed by PAWA to perform instructional work in designated areas involving the training of flight engineers, flight personnel and maintenance personnel. By a letter of agreement dated February 19, 1986, Pan Am Corp. agreed that it, or any successor, would be bound by Article 1 of the Agreement.

In April 1986, Pan Am Corp. acquired a small regional airline, Ransome Airlines, Inc. (Ransome), which was later renamed Pan Am Express, Inc. After becoming a wholly owned subsidiary of Pan Am Corp., Ransome continued to use its own employees as training personnel, rather than the OTI's employed by PAWA and represented by FEIA. None of the approximately 16 Ransome training personnel is represented by FEIA; some are represented by other unions and some are not represented by any union.

In August 1966, FEIA filed a grievance, alleging that Pan Am Corp. had violated Article 1 of the Agreement "by the failure of its subsidiary, Ransome Airlines to em-

ploy OTI's in accord with the Agreement." Pursuant to the Agreement, FEIA sought to have its grievance referred to a Board of Adjustment for arbitration and requested as relief both the assignment of work to the OTI's and backpay for all OTI's damaged by the contractual violation. Pan Am Corp. and PAWA took the position that the grievance involved a representation issue within the exclusive jurisdiction of the National Mediation Board (NMB), and refused to submit to arbitration unless required to by a court of competent jurisdiction. In September 1987, FEIA instituted this action.

In January 1988, this court decided in defendants' favor another case involving similar issues raised by another union arising out of the same acquisition of Ransome by Pan Am Corp. Independent Union of Flight Attendants (IUFA) v. Pan American World Airways, Inc., 836 F.2d 130 (2d Cir. 1988) (per curiam), aff'g 664 F. Supp. 156 (S.D.N.Y. 1987). Thereafter, FEIA amended its grievance to eliminate any claim to work reassignment but continued to seek damages. Defendants maintained their refusal to submit the dispute to a Board of Adjustment.

In an opinion filed in July 1989, and reported at 716 F. Supp. 110, Judge Leisure dismissed the complaint for lack of subject matter jurisdiction. The judge held that the dispute implicated representation issues within the exclusive jurisdiction of the NMB pursuant to § 2 Ninth of the Act, 45 U.S.C. § 152 Ninth, and that resolution by a Board of Adjustment acting pursuant to § 204 of the Act, 45 U.S.C. § 184, and Article 23 of the parties' Agreement was thus precluded, at least in the first instance. The court believed that our recent decision in *IUFA*, mentioned above, controlled the disposition of this case. In *IUFA*, a flight attendants' union sought to compel arbitration of its claim that Pan Am Corp. and PAWA had violated the scope clause of their collective bargaining agreement by failing to employ flight attendants represented by IUFA on Ransome flights. The district court dismissed the com-

plaint for lack of subject matter jurisdiction, and we affirmed.

On appeal, FEIA continues to argue, as it did in the district court, that this case is distinguishable from *IUFA* because FEIA seeks only a retroactive award of damages resulting from defendants' noncompliance with a scope clause and not, as the union sought in *IUFA*, a prospective order reassigning work to members of its bargaining unit. FEIA contends that a claim for damages, unlike a claim for work reassignment, does not involve the resolution of representation issues since it calls for only a factual determination under the FEIA Agreement of whether the individuals who received the challenged work were OTI's working under the Agreement.

We disagree. As the district court correctly noted, although this case may not present "a traditional dispute over representation," 716 F. Supp. at 115, it presents the same factors which, for the *IUFA* court, had implicated representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes. See IUFA, 664 F. Supp. at 159; see also Western Airlines, Inc. v. International Brotherhood of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., sitting as Circuit Justice) ("The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board."). Moreover, despite FEIA's effort to characterize *IUFA* as only a work reassignment case (concededly within the jurisdiction of the NMB), the union there also sought "make whole" relief, i.e., money damages, as FEIA does here. In addition, an award of the damages sought here—or even a realistic threat of such an award—would have the same practical effect as work

reassignment on settling representation issues by extinguishing the possibility of a separate Ransome bargaining unit. No company in its right mind would continue to pay twice for the same work; it would take steps to transfer the work, if it could. Thus, like the district court, we reject FEIA's characterization of the present conflict as involving solely a "minor dispute," that is, a dispute over the interpretation or application of existing collective bargaining agreements, which under § 204 of the Act, 45 U.S.C. § 184, is committed to an authorized Board of Adjustment for resolution.

FEIA also argues that if the dispute is referred to the NMB, the scope clause will be rendered a nullity, since the NMB lacks jurisdiction to enforce the terms of collective bargaining agreements. FEIA maintains that this would deprive OTI's of the fruits of their 1986 bargain with appellees Pan Am Corp. and PAWA and would unjustly secure for appellees the concessions made in exchange for the work assignment agreement. Such a result, FEIA says, would also run counter to the statutory purposes of section 2 First of the Act, 45 U.S.C. § 152 First, which imposes on carriers a duty to "make and maintain agreements." We are not persuaded. As the district court pointed out, the NMB "must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented"; only after the NMB's determination "may the union and the employer, or their arbitrator, establish or interpret contractual working conditions." 716 F. Supp. at 116.

In short, we would ordinarily stop at this point and affirm for the reasons given by the district court were it not for FEIA's final argument. FEIA asks us to follow the decision of the D.C. Circuit in Association of Flight Attendants v. Delta Air Lines, Inc., 879 F.2d 906 (D.C. Cir. 1989), decided after the district court's opinion in this case. The D.C. Circuit held, in the context of an airline merger, that the district court had jurisdiction to order

arbitration of the union's claim for damages against the surviving carrier, which was based on the alleged violation of a successorship clause in the union's contract with the absorbed carrier. Appellant's reliance on the *Delta* decision is inapposite for two reasons. First, as indicated above, we do not write upon a blank slate in this area, in view of our controlling precedent in *IUFA*. Second, by the time of the D.C. Circuit's *Delta* decision, the merger had been consummated and the NMB had retroactively extinguished the union's certification (since that union then represented only a minority of the relevant class of employees); thus, in view of the NMB's conclusive determination of the representation issue, a court order compelling arbitration of the damages claim would not interfere with the NMB's exclusive jurisdiction. Such a conclusive determination of the representation issue, without the interference of the threat of an award, is precisely what is lacking here.

The judgment of the district court is affirmed.